Case No: CL-2014-000271

Neutral Citation Number: [2017] EWHC 253 (Comm)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/02/2017

Before:

THE HONOURABLE MR JUSTICE WALKER

- -

Between:

TEEKAY TANKERS LTD (a company incorporated in the Marshall Islands)	Claimant
- and -	
STX OFFSHORE & SHIPBUILDING CO. LTD (a company incorporated in the Republic of Korea)	Defendant

- -
- -

Huw Davies QC & James Willan (instructed by Haynes and Boone CDG, LLP) for the Claimant
Stephen Hofmeyr QC & Gavin Geary (instructed by MFB Solicitors) for the Defendant

Hearing dates: 11, 12, 13, 14, 18, 19 April 2016

- -

Judgment

Mr Justice Walker:

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A. Introduction and outcome

A1. The context and the issues

A1.1 The parties and the proposed oil tankers

1. This case concerns a dispute between a shipping company and a shipbuilder. For ease of reference, Annex 1 sets out abbreviations and short forms used in the present judgment.

2. The claimant, Teekay Tankers Ltd, is a company incorporated in the Marshall Islands. I shall refer to it as "TT". TT is publicly listed on the New York Stock Exchange. Roughly a quarter of its shares are indirectly held by Teekay Corporation ("Teekay Corp"). Teekay Corp is also a Marshall Islands company publicly listed on the New York Stock Exchange. Both TT and Teekay Corp have their operational base in Vancouver, Canada. From that base TT operates a fleet of oil tankers.

3. The defendant, STX Offshore & Shipbuilding Co., Ltd., is a company incorporated in the Republic of Korea. I shall refer to it as "STX". On 7 June 2016 the Korean court made an order commencing a Korean rehabilitation proceeding, broadly comparable to an English administration, in respect of STX. In England and Wales an order made on 23 June 2016 in the Companies Court recognises the Korean rehabilitation proceeding as the "foreign main proceeding" under Article 17 of Schedule 1 to the Cross-Border Insolvency Regulations 2006. The effect of the Companies Court order is to stay the present proceedings save for the handing down of the present judgment and a hearing to deal with certain matters consequential upon the present judgment.

4. In the spring of 2013 TT and STX entered into agreements which envisaged the construction by STX at its yard in Korea of 16 vessels of a type generally known as "Aframax" tankers. They were each to be 113,000 DWT crude oil tankers of identical design, including in relation to each vessel a choice of additional coatings to enable her to carry a refined product. A tanker with the benefit of such coatings was described as "product ready".

A1.2 The March 2013 LOI: "firm four" vessels, & LOI options

5. On 15 March 2013 TT and STX signed a letter of intent ("the LOI") for STX to build and TT to purchase "firm four" vessels ("the firm vessels"), and for STX to grant to TT options ("the LOI options") for a further three sets of four vessels ("the optional vessels").

A1.3 The April contracts: the firm SBCs and the option agreement

6. On 5 April 2013 four shipbuilding contracts ("the firm SBCs"), each concerning one of the firm vessels, were made between STX as builder and, in the case of each firm SBC, a wholly owned subsidiary of TT as buyer.

7. Also on 5 April 2013 TT and STX signed an option agreement ("the option agreement") which provided, among other things, for TT to have options to order three additional sets of up to four vessels. I shall refer to these three options together as "the April options", in order to distinguish them from the LOI options. Individually I shall refer to the three April options as "April option 1", "April option 2", and "April option 3" respectively. Turning to the vessels contemplated by the respective options, I refer to them respectively as "the April option 1 vessels", "the April option 2 vessels" and "the April option 3 vessels", and generally as "the April option vessels".

8. The terms of the April options differed from those set out in the LOI options, in particular in relation to delivery.

9. I shall refer to the firm SBCs and the option agreement together as "the April contracts", and to the four buyers under the firm SBCs as "the firm SBC buyers".

A1.4 The arbitrations and awards under the firm SBCs

10. In 2014 each firm SBC buyer began arbitration proceedings ("the arbitrations") against STX. The eventual tribunal in each of the four arbitrations comprised the same three arbitrators: Sir Bernard Rix, Mr Timothy Young QC and Mr Alistair Schaff QC. On 4 December 2015 they issued four awards ("the awards"), along with a document ("the arbitrators' reasons") giving the reasons for the awards. The operative part of each award stated that the relevant firm SBC buyer was awarded an amount of USD 8,110,000 by way of damages for STX's repudiation of the relevant firm SBC.

A1.5 Past and current issues in the present claim

11. In the present claim, begun on 11 April 2014, TT says that STX repudiated or renounced the option agreement, and that TT was therefore entitled to and did terminate that agreement. TT claims damages of USD 178.8m to compensate it for loss of profits it says it would have made if STX had complied with its obligations under the option agreement.

12. By amendment TT seeks to rely on the arbitrations in support of its claim. In that regard it advances assertions that the effect of the arbitrations is to debar STX from relying on certain arguments that might otherwise be open to STX. I explain more about these assertions in section A.3.3 below.

13. STX denies liability. Its defence was served on 18 December 2014, after a jurisdiction challenge by STX had failed.

14. A prominent feature of the defence was an assertion ("STX's oral agreement assertion") which has now been withdrawn. It concerned a provision of the firm SBCs under which the buyer's obligation to pay instalments of the contract price was conditional upon STX furnishing the buyer with a letter of guarantee ("the refund guarantee") covering the

instalment amount. STX's oral agreement assertion was, primarily, that oral discussions on 4 April 2015 qualified the contracts made the following day so that:

> […] if STX was unable to procure Refund Guarantees, the contracts (i.e. those whose entry was contemplated pursuant to the Letter of Intent, including the Option Agreement) would be terminated on a 'drop hands' basis (i.e. on the basis that the parties would 'walk away' from the contracts and/or Teekay would not seek to exercise their options).

15. Now that STX's oral agreement assertion has been withdrawn, STX's first answer on liability is an assertion that the option agreement was void for uncertainty. If that be wrong, then STX's second answer on liability is that it neither repudiated nor renounced the option agreement.

16. If both these be wrong, with the result that STX is liable to TT, then STX disputes quantum – i.e. the amount of TT's claim. In that regard STX says that the damages payable are nil, or at most a sum much smaller than is claimed by TT.

17. In addition STX advances a counterclaim against TT. The counterclaim concerns alleged breaches by TT of the confidentiality of the arbitrations: see sections A1.4 above and A3.4 below.

A2. The written evidence

18. Each side served statements of witnesses of fact. Each side also adduced expert evidence concerning ship valuation.

19. The first factual witness relied upon by TT was Mr Niranjan Dhurandhar. His witness statements were dated 30 July 2015 ("Dhurandhar 1") and 23 September 2015 ("Dhurandhar 2"). Mr Dhurandhar was Director for Sale and Purchase and New Buildings at Teekay Corp.

20. The second factual witness relied upon by TT was Mr Arthur Bensler. His witness statements were dated 29 July 2015 ("Bensler 1"), 22 September 2015 ("Bensler 2") and 18 March 2016 ("Bensler 3"). Mr Bensler joined Teekay Corp in 1998 as its General Counsel. He became executive vice-president of Teekay Corp in 2006, and continued to serve as Teekay Corp's General Counsel. From 2007 until 17 September 2014 Mr Bensler served as Secretary of TT. He became a Director and the Chairman of TT on 12 June 2013.

21. The third factual witness relied upon by TT was Mr William Hung. His witness statement ("Hung 1") was dated 28 November 2013. Mr Hung was Vice President of Strategic Development Group of Teekay Corp, and was also a member of the management team of Teekay Tanker Services. Mr Hung's evidence was not contentious; he did not give oral evidence.

22. STX served statements of five proposed witnesses of fact. However, following withdrawal of STX's oral agreement assertion, STX placed no reliance upon the evidence in those statements. In those circumstances I list for convenience only the names of the proposed witnesses and some information about them:

(1) Mr Sun Moo Kim. I shall refer to him as "Mr SM Kim". Mr SM Kim was Vice President of Sales and Marketing for STX.

(2) Mr Gwan Ho Song, also known as "Andy Song". Mr Song was General Manager, Sales and Marketing, Team No. 2 for STX.

(3) Mr Bum So Lee. I shall refer to him as "Mr BS Lee". Mr BS Lee was Vice President and leader of Finance Team of STX.

(4) Mr Sungbeum Suh. Mr Suh was, from July 2013 onwards, Manager in the STX Group Restructuring Unit, Corporate Restructuring Department at Korea Development Bank ("KDB").

(5) Mr Bong Hee Lee. I shall refer to him as "Mr BH Lee". Mr BH Lee was Deputy General Manager of Corporate Restructuring at KDB from February 2009 until January 2014.

23. As to ship valuation:

(1) TT relied on expert reports from Mr Nicholas Willis dated 5 November 2015 ("Willis 1"), 22 December 2015 ("Willis 2") and 10 April 2016 ("Willis 3"). Mr Willis is currently the managing director of Ship Valuation Consultancy Ltd;

(2) STX relied on expert reports from Dr Adam Kent dated 5 November 2015 ("Kent 1"), 18 December 2015 ("Kent 2") and 5 April 2016 ("Kent 3"). Dr Kent is a director and shareholder of Maritime Strategies International Ltd;

(3) Mr Willis and Dr Kent agreed a joint memorandum dated 3 December 2015 ("the Valuation Joint Memorandum").

A3. The course of the trial

A3.1 Overview of the trial

24. At the trial Mr Huw Davies QC and Mr James Willan, instructed by Curtis Davis Garrard LLP (now Haynes and Boone CDG, LLP, and referred to below as "CDG"), appeared for TT. Mr Stephen Hofmeyr QC and Mr Gavin Geary, instructed by MFB Solicitors ("MFB"), appeared for STX. I am grateful to the legal teams on both sides for the considerable assistance given to me before and during the trial.

25. The trial occupied 6 hearing days. On days 1 and 2 leading counsel for each side made opening speeches. Oral evidence was then heard on days 2 to 4 inclusive:

(1) Mr Dhurandhar gave oral evidence on day 2; Mr Bensler gave oral evidence on days 2 and 3;

(2) Mr Willis gave oral evidence on Day 3; Dr Kent gave oral evidence on days 3 and 4.

26. Day 5 was devoted to Mr Davies's oral closing submissions on behalf of TT. On day 6 Mr Hofmeyr made oral closing submissions for STX, and Mr Davies made oral reply submissions.

A3.2 An initial ruling

27. At an early stage a question arose as to whether I should, at STX's request, debar TT from relying upon a short passage in Bensler 3. I concluded that TT should be allowed to rely upon the passage in question. My ruling to that effect was based on three reasons. First, such delay as had occurred on the part of TT in seeking to rely upon this passage was of no great seriousness or significance. Second, the default occurred because it was only on 18 March 2016 that TT's legal team appreciated that there might actually be an issue on the point dealt with in the passage. Third, assuming that TT's legal team had been mistaken in thinking that the point was not in issue, the mistake was understandable and excusable.

A3.3 TT's estoppel/ abuse of process assertions

28. In February 2016 TT served and filed amended particulars of claim. Ordinarily it would have required the court's permission for the amendments. However under CPR 17.1(2)(a) it did not need the court's permission because STX, being the only other party to the proceedings, had given written consent for them to be made. The amendments introduced, among other things, what I shall call "TT's estoppel/abuse of process assertions". These assertions were that STX could not advance certain arguments in the present proceedings because:

    (1) it was bound by findings in the arbitrators' reasons; or

    (2) it would be an abuse of process to rely upon such arguments when they could have been pursued in the arbitrations, but in fact either were not raised or were abandoned in the arbitrations; or

    (3) raising the arguments in these proceedings would amount to a collateral attack on the awards.

A3.4 Protecting the confidentiality of the arbitrations

29. STX served an amended defence on 7 March 2016, again without a need for permission, under CPR 17.1(2)(a). At the same time and as part of the same document it purported to introduce a counterclaim. This was ineffective as the counterclaim was out of time and required the court's permission under CPR 20.4(2)(b). The defect in this regard was rectified by an order made on paper on 22 March 2016. The order stated that it was a consent order.

30. The counterclaim complained that TT had breached arbitral confidentiality by:

    (1) disclosing the awards and the arbitrators' reasons to the Seoul Central District Court; and

    (2) making reference to the awards and the arbitrators' reasons in the present proceedings.

31. It was accepted by STX that the operative parts of the awards, as set out in section A1.4 above, were no longer confidential. The reason is that on 15 February 2016 a public judgment enforcing the awards was granted by Blair J.

32. The fact remains, however, that parts of the amended particulars of claim and an amended reply revealed matters ("the contentious confidential matters") dealt with in the arbitrators' reasons. Subject only to two methods by which public disclosure might have occurred, the position at the start of the trial was that the contentious confidential matters had not at that stage been made public. The first possible method was by disclosure in Korea to the Seoul Central District Court. In that regard, however, STX stated on day 1 of the trial that, despite TT's disclosure to the Korean court, the award and reasons remain private in Korea: TT's disclosure to the court in Korea does not have the effect of making them available to non-parties. The second possible method would arise in England and Wales if, as explained below, in relation to the amended particulars of claim or the amended reply a non-party had exercised the right to obtain a copy of court records under CPR 5.4C.

33. TT claimed that it was entitled both to disclose the contentious confidential matters to the Seoul Central District Court and to disclose them in these proceedings. This was disputed by STX. Preparations for the trial were under way. If confidentiality were to be preserved pending resolution of that dispute, something needed to be done urgently.

34. If a proposed statement of case would reveal confidential matters concerning an arbitration, then it would normally be appropriate to give warning in advance to those who would ordinarily expect the confidentiality of the arbitration to be respected. In the present case TT, entirely properly, by letter emailed on Monday 11 January 2016 warned STX of the proposed disclosure to the Korean court, and of the proposal to amend the particulars of claim.

35. As regards the Korean court, TT warned that disclosure would be no earlier than Thursday 14 January 2016. STX's response was to ask for an extension of time. TT declined to give an extension. Instead it provided the awards and the arbitrators' reasons to the Korean court on 14 January 2016.

36. As regards the position in this country, the course eventually taken by the parties was for amended particulars of claim to be filed by consent (see section A 3.3 above). STX gave its consent on conditions aimed at preserving confidentiality of the arbitrations if the court were to hold that STX had been entitled to insist on maintaining that confidentiality. One of the conditions was that, among other things, while any judgment given would be "a public judgment (as far as this was within the parties' control)" TT would not resist an application by STX that the trial be in private. In compliance with this condition TT did not oppose STX's paper application for what became the purported consent order of 22 March 2016. Paragraph 2 of that order stated:

> 2. Unless otherwise ordered by the trial judge, the hearing of this matter be in private.

37. To my mind this course was misconceived. First, it seems to me that before consenting to the amended particulars of claim STX should have considered applying

to the court under CPR 5.4C. The same applies to consent given by STX to consequential amendments to TT's reply. The reason is that in the absence of an order under CPR 5.4C persons who are not parties to the proceedings may, subject to certain limited exceptions, obtain from court records a copy of a statement of case. Once they had been filed with the court, the amended particulars of claim, and the amended reply, were both statements of case falling within CPR 5.4C. Accordingly under the normal operation of CPR 5.4C a non-party exercising the right to obtain copies of the amended particulars of claim and the amended reply would gain sight of the contentious confidential matters. If their confidentiality were to be safeguarded it was necessary, prior to filing with the court, to seek from the court an order modifying the operation of CPR 5.4C in the present case.

38. Second, and importantly, proceedings in this court are, in the absence of good reason to the contrary, conducted in public. Every practitioner in this court must recognise that this is a fundamental principle of justice. The appropriate course was not to propose a default provision that the trial would be in private. The course that should have been taken was for the parties to work together on two tasks well in advance of the trial. The first task was to identify evidence and argument which could be heard in public in the normal way without there being any real risk of breach of confidentiality. The second task was to assess, as regards the remaining evidence and argument, the scope for steps to enable as much as possible of that evidence and argument to take place in public without breaching confidentiality. Carrying out these two tasks in advance would have enabled efficient consideration by the court of whether, and if so to what extent, to grant an application for privacy.

39. Failure to take this course meant that much valuable time immediately before and in the early days of the trial had to be devoted to consideration of things which should have been considered much earlier. In the event it was possible at trial to deal with the vast majority of the evidence and argument in public without any conceivable danger of revealing, if they had not already been revealed, the contentious confidential matters. I was, however, persuaded that, pending an eventual ruling, a small portion of the hearing should be in private. Accordingly, so as to provide such interim protection of the contentious confidential matters as was necessary pending this judgment I made an order on 14 April 2016 ("the confidentiality order"). The broad effect of the confidentiality order was that:

    (1) unless permitted by an order of the court, a non-party could obtain from the court records copies of neither the amended particulars of claim nor the amended reply and defence to counterclaim;

    (2) instead a non-party could obtain edited copies of those documents;

    (3) TT and STX were to produce edited versions of their opening skeleton arguments for production, if requested, to non-parties;

    (4) unless otherwise ordered, closing submissions dealing with matters whose disclosure was affected by the outcome of arguments of confidentiality were to be heard in private, and parts of written submissions dealing with such matters were to be kept private and confidential; and

(5) subject to the above, the trial of the action would proceed in public unless and until otherwise ordered.

A4. The outcome

40. For reasons given in section C below, I conclude that STX's first answer on liability is sound: the option agreement was indeed void for uncertainty. The result is that TT's claim fails. If, however, STX's first answer on liability had not been sound, then I would not have accepted STX's second answer: on the assumption that the option agreement was valid, STX's conduct was in my view such as to amount to a renunciation of that agreement: see section D below. In section E below I set out my reasons for concluding that, if liability had been established, the total damages payable by STX to TT would have amounted to US$116,920,000. My reasoning is explained in section E, where I also explain that this conclusion is subject to a reservation concerning a possible allowance for the fact that damages would be payable earlier than the dates for payment of the price under the relevant shipbuilding contracts.

41. In section F below I reject TT's claims of issue estoppel and abuse of process. In section G I explain that STX's counterclaim fails. The reason is that what STX asserts to have been a breach of confidence in my view falls within the exception for disclosures made in the interests of justice. TT's disclosures to this court and to the court in Korea fell within that exception because TT was advancing an arguable assertion, put forward in good faith, that what happened in the arbitrations could be relied upon for the purpose of TT's estoppel/ abuse of process assertions, and because TT gave due warning to STX, sufficient to enable STX to take steps to maintain confidentiality to the extent that the court considered it appropriate.

B. Background and history

B1. Background and history: general

42. Much of the background and history is not in dispute. In this section I summarise the main features. For this purpose I draw upon historical accounts given by the two sides. When quoting from emails and other documents I have, where convenient, added paragraph or other numbers in square brackets with accompanying format adjustments, and I have used "[…]" to indicate that the quotation omits a passage in the document.

B2. LOI clause 6: delivery dates for optional vessels

43. The LOI contained express provisions as to the delivery dates for the optional vessels:

(1) Paragraphs a), b) and c) of clause 6 of the LOI stated:

> a) First Option: first set of 4 Optional Vessels – Option to be declared within six (6) months after signing the contracts of the Firm Vessels; contract price for each Optional Vessel to be the same as the contract price for each Firm Vessels; delivery to be

mutually agreed between Builder and Buyer but in any event to be within 2016 for each Optional Vessel;

b) Second Option: second set of 4 Optional Vessels – Option to be declared between six (6) and twelve (12) months after signing of the contracts of the Firm Vessels; contract price for each Optional Vessel to be Five Hundred Thousand United States Dollars (US$500,000) higher than the contract price for each Firm Vessel; delivery to be mutually agreed between Builder and Buyer but in any event to be within the first half of 2017 for each Optional Vessel;

c) Third Option: third set of 4 Optional Vessels – Option to be declared between twelve (12) and eighteen (18) months after signing of the contracts of the Firm Vessels; contract price for each Optional Vessel to be One Million United States Dollars (US$1,000,000) higher than the contract price for each Firm Vessel; delivery to be mutually agreed between Builder and Buyer but in any event to be within the first half of 2017 for each Optional Vessel.

(2) the unnumbered final paragraph of clause 6 of the LOI stated:

The specifications of the Optional Vessels shall be identical to those of the Firm Vessels and the delivery dates for the Optional Vessels subject to the provisions above shall be mutually agreed upon Buyer's declaration of the relevant Option. Each of the First, Second and Third Options are mutually exclusive and not contingent on an earlier Option having been declared. The Buyer can declare up to all four Optional Vessels or fewer in any Option declaration.

B3. Vancouver, 3 to 5 April 2013

B3.1 Doubts about STX's financial stability: proposal for a VBNP

44. The option agreement and the firm SBCs were negotiated in Vancouver from Wednesday 3 to Friday 5 April 2013, and were signed on the Friday evening. Mr Dhurandhar was the lead negotiator for TT. He explained in his witness statement that shortly before these negotiations began TT became aware of something which was "obviously a significant development":

> … on Tuesday 2 April 2013 - the day before the negotiation meetings were to begin - I had read in *Tradewinds*, the shipping journal, that STX "*was in talks with creditors to restructure debt*" and was seeking to enter into a Voluntary Business Normalisation Program ("VBNP") by which it would seek the "*voluntary rescheduling of repayments*".

45. In these circumstances TT questioned STX as to its financial stability. An email in response was sent by Mr Song on 3 April 2013. The email made reference to STX's

major creditor, KDB. KDB is a wholly state-owned bank established by the Republic of Korea to finance major industrial projects.

46. Mr Song's email stated, among other things:

> … since KDB is a national bank and STX holds a position of great importance in terms of employment, facilities and technical skills of national key industries, normalization process shall be carried out under support and cooperation of the Korean government without fail. Thus, we will not face any kind of worst case scenario.

B3.2 The firm SBCs

47. The firm SBCs were signed in Vancouver on 5 April 2013 by Mr Bruce Chan, Chief Executive Officer of TT, and by Mr Sang Ho Shin, President and Chief Executive Officer of STX. The terms of the four firm SBCs were in all material respects identical, save only that different delivery dates were specified. Taking by way of example the firm SBC for Hull No. S1672:

(1) The initial contracting words stated:

> [0.1] In consideration of the mutual covenants contained herein
>
> [0.2] the Builder agrees to design, build, launch, equip and complete one (1) 113,000 DWT Crude / Product Ready Oil Tanker as described in Article 1 hereof (hereinafter called the "Vessel")
>
> [0.3] at the Builder's shipbuilding facilities including its subsidiary and/or related company (i.e. affiliated or sister company) in the Republic of Korea (hereinafter called the "Shipyard")
>
> [0.4] and to deliver and sell the Vessel to the Buyer,
>
> [0.5] and the Buyer agrees to accept delivery of and purchase from the Builder the Vessel
>
> [0.6] according to the terms and conditions hereinafter set forth;

(2) Article 1 set out the principal particulars and dimensions of the vessel.

(3) Article 2 provided that the contract price for the vessel was USD 42,500,000, subject to any adjustments provided for by the contract.

(4) Article 7(a) provided that, subject to any postponement provided for by the contract, the vessel was to be delivered safely afloat by STX to the firm SBC buyer at the shipyard on 30 October 2015.

(5) Article 10 provided:

> 10. PAYMENT
>
> […]
>
> (h) PAYMENT PRIOR TO DELIVERY
>
> If […] this Contract is cancelled by the Buyer in accordance with the terms of this Contract, the Builder shall forthwith return to the Buyer […] the full amount of total sums paid by the Buyer to the Builder prior to the delivery of the Vessel, TOGETHER with interest thereon as herein provided […]
>
> […]
>
> (j) DISCHARGE OF OBLIGATIONS
>
> The refund provided in the foregoing paragraphs (h) and (i) by the Builder to the Buyer shall forthwith discharge all the obligations, duties and liabilities of each of the parties hereto to the other except the claims the Builder has against the Buyer, if any, under this Contract […]
>
> (k) REFUND GUARANTEE
>
> As security for the refund of Instalments prior to delivery of the Vessel, the Builder shall (as a condition of the Buyer's obligation to make payment of any of the Instalments of the Contract Price) furnish the Buyer with a letter of guarantee covering the amount of the instalments and any interest thereon issued by The Export-Import Bank of Korea OR The Korea Development Bank OR Korea Finance Corporation at the Builder's option but always subject to final approval by the Buyers and/or the Buyers' financiers (the "Refund Guarantee") in favour of the Buyer in the same form as the Refund Guarantee attached hereto as Exhibit A.
>
> […]

(6) Article 11 provided:

11. DEFAULT BY THE BUYER AND THE BUILDER

[…]

(f) BUILDER'S DEFAULT

In addition to the Buyer's rights of rescission elsewhere in this Contract, the Buyer shall be entitled to rescind this Contract forthwith should any of the following events occur:-

[…]

(vi) If the Builder fails to furnish the [Buyer] with the Refund Guarantee in Article 10(k) within thirty (30) banking days after the effectiveness of the Contract (banking day means that banks are open for business in Seoul and New York City other than Saturdays and Sundays).

[…]

(g) REFUND BY BUILDER

In the event that the Buyer shall exercise its rights of rescission of this Contract under and pursuant to any of the provisions of this Contract specifically permitting the Buyer to do so, the Builder shall, without deduction, set-off or withholding of any amount whatsoever, promptly refund to the Buyer […] the full amount of all sums paid by the Buyer to the Builder on account of the Vessel […]

(h) DISCHARGE OF OBLIGATIONS

Upon such refund by the Builder to the Buyer, all obligations, duties and liabilities of each of the parties hereto to the other under this Contract shall be forthwith completely discharged.

(7) Article 13 provided:

13. ARBITRATION

[…]

(b) PROCEEDINGS

If any claim, difference or dispute between the parties hereto as to any matter arising out of or relating to this Contact cannot be settled by the parties themselves, the

same shall be submitted to, and settled by, arbitration held in London, England […]

[…]

(8) Article 18 provided:

18. INTERPRETATION

[…]

(g) CONFIDENTIALITY

This Contract and the transaction, contracts and negotiations related hereto shall be kept confidential by the parties hereto and their professional advisors, except as may otherwise be required by law […] or to obtain financing, in which case the disclosing party shall first obtain an analogous confidentiality agreement from any potential sources of financing.

[…]

48. The delivery dates in the other firm SBCs were: Hull No. S1673 was to be delivered on 30 November 2015, Hull No. S1674 was to be delivered on 29 February 2016, and Hull No. S1675 was to be delivered on 29 April 2016.

B3.3 The option agreement: April options 1, 2 and 3

49. The option agreement was also signed in Vancouver on 5 April 2013 by Mr Chan on behalf of TT and by Mr Shin on behalf of STX. The opening paragraph comprised initial contracting words by which STX granted to TT what, in section A1.3 above, I have called April options 1, 2 and 3. The opening paragraph referred to the firm vessels as "the Vessels". It also described what I have called the April option 1 vessels, the April option 2 vessels and the April option 3 vessels. The initial contracting words set out in the opening paragraph were as follows:

> [0.1] With reference to the [firm SBCs]… and in consideration of the [firm SBC buyers] entering into the [firm SBCs] and other good and valuable consideration, [TT] and [STX] agree that [STX] grants to [TT] the option to order three (3) sets of four (4) additional units identical to the Vessels (hereinafter called the "First Optional Vessels", "Second Optional Vessels", "Third Optional Vessels" respectively) upon the terms and conditions stipulated hereinbelow:

50. There then followed seven numbered clauses:

> 1. Option Declaration:
>
> [1.1] [TT's] option for the First Optional Vessels shall be declarable by October 5, 2013, Second Optional Vessels shall

be declarable between October 6, 2013 and April 5, 2014, Third Optional Vessels shall be declarable between April 6, 2014 and October 5, 2014, by serving upon [STX] a written notice by telefax or e-mail as per Article 19 of the [firm SBCs].

[1.2] However, it is mutually agreed between [STX] and [TT] that each of the first, second, and third options are mutually exclusive and not contingent on an earlier option having been declared and [TT] can declare up to all four (4) optional Vessels or fewer in any option declaration.

2. Contract Price:
[2.1] The Contract Price for the First Optional Vessels based on the Specifications as stipulated in No. 3 herein shall be same as the Vessels.

[2.2] However, the Contract Price for the Second Optional Vessels shall be Five Hundred Thousand United States Dollars (US$500,000) higher than the contract price for earlier option for each and Third Optional Vessels shall be Five Hundred Thousand United States Dollars (US$500,000) higher than the contract price for earlier option for each.

3. Specifications:
[3.1] The specifications for the First, Second and Third Optional Vessels shall be identical to the contractual specifications for the Vessels stipulated in Article 1 of the Shipbuilding Contracts and Coating Option Agreement.

[3.2] The Buyer has the option to change the design from the base specification to "Fatboy/Wide beam, longer length Aframax" design, such option to be declared on or before 31st December 2013.

4. Delivery:
[4.1] The Delivery Dates for each [of the] Optional Vessels shall be mutually agreed upon at the time of [TT's] declaration of the relevant option,
[4.2] but [STX] will make best efforts to have a delivery within 2016 for each [of the] First Optional Vessels, within 2017 for each [of the] Second Optional Vessels and within 2017 for each [of the] Third Optional Vessels.

5. Contract:
Following exercise of its option by [TT], [TT] and [STX] shall enter into shipbuilding contracts in the form and content identical to the [firm SBCs] for the Vessels logically amended within ten (10) days after the date [TT] exercises its option under No. 1 herein unless otherwise mutually agreed.

> 6. Coating Option
> [6.1] Each of the buyers of a Vessel or any Optional Vessels shall have the right to exercise the following option which shall be declared by such buyers within two (2) month prior to Steel Cutting of the respective Vessel or Optional Vessel.
>
> [6.2] If a buyer fails to declare the application of the option within the said time, it shall be deemed that such Buyer has cancelled its option to apply this automatically.
>
> Content of option
> [6.3] Cargo & slop tanks of the VESSEL shall be coated fully to comply with Product/ Crude oil loading based on the following paint scheme with extra costs of USD 2,000,000/ Vessel.
>
> […]
>
> 7. Laws Applicable
> This agreement shall be governed by and construed in accordance with English law.

B4. May to October 2013

B4.1 EOT to 17 June for provision of refund guarantees

51. As noted above, in each of the firm SBCs article 11(f)(vi) conferred on the firm SBC buyer an entitlement to rescind if the refund guarantee were not provided within a period of 30 banking days. This period would expire on 20 May 2013. An email was sent on 14 May 2013 by Mr SM Kim and Mr Song to Mr Dhurandhar. The email sought an extension of the period to 30 June 2013. In that regard the email stated:

> … we cannot help reaching a conclusion that it seems not positive for the refund guarantees to be issued by 20 May as stipulated in the shipbuilding contracts …

52. By email dated 17 May 2013 Mr Dhurandhar on behalf of the firm SBC buyers agreed to grant an extension of time ("EOT") for provision of the refund guarantees until 17 June 2013. Mr SM Kim and Mr Song replied on behalf of STX by email the same day. In their email they said that the extension until 17 June 2013 was appreciated. They added that:

> … the evaluation of the issuance of the refund guarantees is expected to commence from the middle of June 2013 when the due diligence process by the creditors [is] completed and the voluntary business normalization program gets approved and signed by and between the creditors and STX, collectively.

B4.2 From 11 to 18 June: refund guarantees not provided

53. On 11 June 2013 Mr Dhurandhar met Mr SM Kim and others in Seoul. In an email that day to his colleagues in TT Mr Dhurandhar reported on what he had been told. This was, among other things, that STX's discussions with creditors and banks had not been positive so far because the contract price level was too low and the payment terms were "too heavily backloaded". Mr Dhurandhar added that Mr SM Kim had asked if TT could consider, among other things, changing the payment terms. As to that, Mr Dhurandhar's email said:

> My response to STX overall was that this was unacceptable …

54. The extended time period expired on 17 June 2013 without the provision by STX of any refund guarantees. Under article 11(f)(vi) this entitled each firm SBC buyer, should it be minded to do so, to rescind the relevant firm SBC. An email timed at 11:12 that day from Mr SM Kim to Mr Dhurandhar stated:

> It is our regret but we can't help informing you that the issuance of the RGs for the vessels, S-1672 /1673 /1674 /1675 have [...] turned out to be infeasible after the long investigation and due diligence by the creditor banks.
>
> Despite the fact that we, STX Offshore & Shipbuilding, have put our genuine efforts to conduct a successful issuance of RGs and eventually glittering deliveries of the vessels, the loss making structure with high costs and low price of the vessels have led creditor banks to hesitate to approve the issuance of RGs as we have informed.
>
> Since we have considered your esteemed company as one of the top on our customer lists and hoped for a substantial relationship between two companies, we are also at a loss from the current situation and feel slighted.
>
> No matter how you count on the above explanation, we sincerely appreciate your great efforts and cooperation until now in all aspects and would really like to reciprocate your kindness one day, possibly on another project when the current situation of the whole STX group gets solved.
>
> Hoping for your kind understanding on above, we would like to express our sincere appreciation towards Teekay once again.

55. Also on 17 June 2013 Mr Dhurandhar, who was still in Korea, met representatives of STX. In an email to Mr Hvid of TT, Mr Dhurandhar reported:

> [...] I reiterated our firm stand and they say they are trying but will probably have a better chance with the bank after the normalization agreement is signed by end Jul '13.

56. A meeting took place on 18 June 2013 between Mr Dhurandhar and Mr Evensen of TT and Mr Shin and Mr SM Kim of STX. In his email that day to colleagues in TT, Mr Dhurandhar reported, among other things:

> - It sounds like nothing will happen with regards to refund guarantees until after the normalization agreement is signed (by end Jul '13) and a committee is put in place (essentially the bank reps and some from STX)
>
> [...]
>
> - We left the meeting reiterating our position that we want to see STX build our vessels / honor the contract. Mr Shin said he will try again to persuade KDB.

B4.3 Two meetings on 20 June 2013

57. Two meetings took place on 20 June 2013. Those attending the first meeting were Mr Chang Joo Lee of Nonghyup bank, Mr SM Kim and his colleague Mr David Pak of STX, and Mr Dhurandhar. The second meeting was between Mr Dhurandhar and Mr SM Kim. In an email to TT colleagues that day Mr Dhurandhar reported on the two meetings:

> Met with STX and 1 x creditor bank representative who is stationed at STX office this afternoon (Mr. C.J. Lee of Nonghyup bank – he has a marketing background versus the other bank reps who had accounting/ HR background and was representing the creditors including KDB, working level banker, Nonghyup is the third largest creditor at STX).
>
> - The meeting commenced with a recap of where we currently stand with the refund guarantees. The bank representative then made the points that the normalization program is expected to be signed in July'13, there are 8 creditor banks and approval from all of them is required for refund guarantee insurance, project must meet sales guidelines and that our project does not meet the guidelines and banks are reluctant to issue the refund guarantees as the price level / payment terms would result in STX facing losses for a prolonged period of time.
>
> - I countered his point with the fact that we had supported STX from within the highest levels of our organization and that we now expect STX/ creditors to honor the contract. I reiterated that we reserve all our rights, the fact that STX runs a higher risk by not honoring the contract (loss of future business, bad reputation / word on ongoing Stream LNG tender, bad reputation within the industry and other STX customers). The bank representative kept circling back to the sales guidelines and that our contract does not meet the guidelines.

> - The meeting ended after an hour with me repeating myself on the above points and reserving all our rights.
>
> - I then met separately with Mr. S.M.Kim (head of STX sales) who was present when Peter and myself met with Mr. Shin earlier this week. Mr Kim feels that they may have a better chance of getting the refund guarantees after the normalization program is signed in Jul'13 – I repeated our message from earlier this week that we expect Mr. Shin / Mr . Kim to honor the contract and come through on the refund guarantees.
>
> […]

B4.4 The VBNP is signed in July 2013

58. In an email to Mr Dhurandhar on 19 July 2013 Mr SM Kim advised that STX expected the VBNP to be signed "within this month". He added:

> In this regard, we shall be able to resume for discussion with creditor banks about the issuance of RGs for the captioned vessels, hopefully from early next month or a little later. [...]

59. The VBNP was signed on 31 July 2013.

B4.5 Events in August 2013

60. On 8 August 2013 Mr Derek Walford and Mr Tony Armstrong of TT met Mr Young-Dal Choi of STX. Later that day Mr Walford emailed colleagues in TT reporting on the meeting. His email stated, among other things:

> Regret no good news from this end today at all. Tony and I met with Mr. Young-Dal Choi (Head of Ship Technology Department, Senior Vice President/ Naval Architect). Mr Choi had taken part in a teleconference with STX Chairman this morning (sounds like all senior staff attended).
> Although "deal" with KDB has been announced many of details not clear yet.
>
> Mr Choi was very apologetic but went onto say that the RG issue on our vessels will be put back to the end of December this year, this will of course even if agreed then will probably push back delivery dates by up to 6 months. Mr. Choi suspects that STX commercial team will be in touch with us (Niranjan) shortly and possibly suggest change in price. Meanwhile also said that even some projects where RG's have been issued are now in doubt i.e. projects could be cancelled altogether.
>
> KDB appear to be trying to push yard into building smaller simpler vessels, such as MR's and Bulk Carriers rather than larger vessels and certainly not wanting for yard to build LNG and large Container ships. Understand lot of disagreement

> between bank and yard as to what to do, hence some ways making the problem worse. Because of cash flow problems since April they have been pushing deliveries back and end up having to pay penalties. Understand several hundred staff already gone & everyone else waiting to hear what happens now some sort of agreement has been reached with KDB.
>
> […]

61. An email from Mr SM Kim to Mr Dhurandhar timed at 0722 on 14 August 2013 stated:

> As we have mentioned, even in this morning, numerous times by various email correspondences and telephone conversations in regard to the Refund Guarantees for Aframax Tanker for Teekay, we convey our deepest regret to inform you that the creditor banks have rejected our consistent request of issuing of the Refund Guarantees for this projects despite of our hard work.
>
> It is the creditor banks' firm position that unless the profit margin for projects, not only Teekay Projects but also all the other projects that have been signed after entering of the voluntary normalization program, meet the order guide-line, the creditor banks' would not issue the Refund Guarantees. In other words, if the terms and conditions for the projects were to be improved to meet the order guide-line, there might be a higher chance that the Refund Guarantees to be issued.
>
> As you are well aware, the parties well understood the situation that this project has a risk that the Refund Guarantees might not be issued, even before the parties entered into the Contracts and therefore, we believe that the Buyer understands our position as well as our efforts how hard we have strived to issue the Refund Guarantees.
>
> Again, we apologize for this unpleasant situation caused and trust that the Buyer understands our position.

62. On 15 August 2013, in response to an email from Mr Dhurandhar asking about the refund guarantee "anticipated timeline", Mr SM Kim replied:

> Unless we improve price and payment terms to meet the guideline of creditor banks, rg is unlikely to be issued. It is not an issue of timeline.

B4.6 TT on 2 Oct 2013 exercises April option 1

63. By letter dated 2 October 2013 TT exercised April option 1 in relation to all four of the April option 1 vessels. The letter asked STX to provide hull numbers and shipbuilding contracts within 10 days. It may be noted in this regard that clause 5 of

the option agreement (see section B3.3 above) required TT and STX to enter into shipbuilding contracts within 10 days of exercise of the option.

B4.7 Emails 7, 11 Oct, and an EOT for the April option 1 contracts

64. Mr SM Kim of STX responded by email on 7 October 2013. The email was wrongly marked "Without Prejudice". In the email Mr SM Kim noted TT's declaration of April option 1. The third and fourth paragraphs of the email stated:

> [3] However, we would like to express our feeling of regret and unfortunate towards your exercise of the option under unusual circumstance in regard to the Refund Guarantees for firm vessels. As you may understand, under the Voluntary Business Normalization Program with our creditor banks, despite our efforts, it would be hardly possible for issuance of the RGs unless both parties come to an agreement with considerable improvements in terms and conditions of the existing Contracts.
>
> [4] Nevertheless, if you intend to enter into the shipbuilding contracts for the option, we will duly prepare contractual documentations and send them to you within 10 days as per clause 5 in the Agreement, but we envisage that only documentations could be completed without RGs as explained above.

65. The fifth paragraph of STX's 7 October email advanced, for the first time in correspondence between the parties, STX's oral agreement assertion:

> [5] As I look back the contractual discussion agreed between the parties, we thoroughly explained to yourself as well as your colleagues that we were about to enter into the VBNP and that because of nature of the Program, RGs for the firm vessels might not be issued appropriately. We also informed that we had to set the RG validity as a safety, and you fully understood and accepted this suggestion by putting the 30 days time limit. My understanding was also that you agreed that if the RGs were not eventually issued, withdrawal from the Contracts would be made with drop hands basis.

66. The sixth paragraph of STX's 7 October email stated:

> [6] In spite of the above, since you have decided to exercise the first option, we could not but choose to proceed with subsequent actions for contract in accordance with the Agreement by expressing our deep regret at your decision. For our information, it would be highly appreciated if you could kindly inform us of your clear position for the firm and first optional vessels inclusive of remaining second, third and fourth options prior to releasing the contractual documentations for the first optional vessels.

67. On 11 October 2013 Mr Dhurandhar responded by email. The email stated, among other things, that TT did not accept the statements made by STX in the email of 7 October 2013. It added:

> Teekay's intention, subject to board approval for each set, is to declare all the options and our expectation is that STX will comply fully with the terms they agreed to, including the provision of refund guarantees and prices. [...]

68. Also on 11 October 2013 STX requested an extension to the period for concluding the contracts for the April option 1 vessels. The extension sought was until 21 October 2013. On 13 October 2013 TT agreed to extend time:

> […] (in accordance with clause 5 of the option agreement) till Monday 21 October 2013 0800 hrs Vancouver, Canada local time.

B4.8 ND/SMK telcon on 18 October, and emails 21/22 October

69. On 18 October 2013 a telephone conversation ("the ND/SMK October telcon") took place between Mr SM Kim and Mr Dhurandhar. Mr SM Kim recorded the conversation. In Annex 2 to this judgment I set out passages from the transcript.

70. On 21 October 2013 Mr SM Kim emailed Mr Dhurandhar:

> [1] I write in response to your below message dated 11th October, 2013 of which contents are well noted.
>
> [2] It is our much regret that although we have been internally discussing in regard to the optional vessels with our big efforts, unfortunately, we have not reached at the conclusion yet because we are obliged to investigate every matter concerned.
>
> [3] Therefore, it would be appreciated if you could temporarily hold back the optional vessels and, as suggested, consider whether to spare your time for a face to face meeting in around end of October or beginning of November
>
> [4] As explained to you for a few times, there seems to be not much chances for us to have the RGs successfully issued with the existing terms and conditions of the Contracts due to the reasons that we have been under the Voluntary Business Normalization Program. Also I am afraid that, it may generate deeper disputes if both parties make contracts for the optional vessels without the successful issuance of the RGs for existing firm contracts.
>
> [5] Additionally, under the circumstance that the RGs for four firm vessels are not issued yet, it must be clear that the probability of the RG issuance for the additional four vessels would be much negative.

> [6] If I may, I would like to recall the situation when we had a full discussion in Vancouver that we think we have informed you of the certain possibility of the failure of RG issuance and on the basis of the mutual understandings, we have agreed to put a special clause as to the RG issuance at the last minute before the signing.
>
> [7] Moreover, in the situation that I am able to remember the words exchanged interpreting both parties shall drop hands from the contracts in case of no RGs issued, we could not but say we are totally embarrassed.
>
> [8] In any cases, we would like to suggest you again that both parties cooperate to find a solution for the four firm vessels firstly.
>
> […]

71. Mr Dhurandhar replied on 22 October 2013:

> We do not accept the various allegations as to knowledge regarding the refund guarantees and reject any suggestion we have ever agreed to any "drop hands" type scenario. We have repeatedly stated that we expect [STX] to honor all its obligations under the shipbuilding contracts and option agreement. Teekay Tankers, Ltd. hereby reserves all its rights under the shipbuilding contracts and option agreement.

72. Thus, despite TT's exercise on 2 October 2013 of April option 1, the extended deadline of 21 October 2013 passed without the conclusion of any contracts pursuant to that option.

B4.9 TT's internal emails, 27 and 30 October 2013

73. On 27 October 2013 a "monthly report" was emailed by Mr Chan to others within the Teekay group. It noted that TT had exercised April option 1, and added:

> We … were informed that refund guarantees for these vessels are unlikely.

74. On 30 October 2013 Mr Chan again emailed others within the Teekay group. On this occasion he queried a proposed report that TT had received confirmation that no refund guarantees would be issued. It was, he said, inconsistent with a later passage stating that "STX indicated that no refund guarantees would be issued":

> Indicate and confirmation … to me are two different things. I was not aware that they have unequivocally said we are not receiving?

B5. Events in November 2013

B5.1 TT's November claim for USD 61m under April option 1

75. A meeting took place between the parties in London on 16 November 2013. At that meeting Mr Dhurandhar handed to Mr SM Kim and Mr Song a letter dated 14 November 2013 signed by Mr Chan. The letter stated that STX was in breach of the option agreement, and put forward a claim ("TT's November claim") by TT for USD 61,600,000 damages for failure to enter into shipbuilding contracts following the exercise of April option 1. The letter stated, among other things:

> We regret, however, to note that you failed to provide us these contracts as required and it is now clear that you are not intending to do so and the first four option ships will not be delivered to us. We accordingly consider these options to have lapsed and claim damages for our loss of bargain [...]

76. Mr Dhurandhar e-mailed colleagues at TT later that day:

> [1] I met with Mr SM Kim from STX and two of his colleagues (one of which is their lawyer) in London today and handed over the attached letter + delivered a strong message to them. Initial reaction from them was shock as they now realize the scale of damages we are claiming for and that we are going to pursue the legal route soon.
>
> [2] He was trying to pitch the idea of [...] building MRs, LR1s, purchasing an existing LNG carrier newbuild – I told them that Teekay Tankers have no interest in any other segments and are only interested in our contracted Aframax newbuildings and declared options / remaining options.
>
> […]

B5.2 STX's response of 21 November 2013

77. STX's response to TT's November claim took the form of an e-mail, also wrongly marked "without prejudice", sent by Mr SM Kim on 21 November 2013. After referring to TT's November claim, the e-mail began with an expression of regret and an expression of surprise:

> [2] First of all, we wish to express our deepest regret that the refund guarantees for the four (4) firm vessels could not be procured, despite the fact that STX made every possible effort to obtain these from the designated banks.
>
> [3.1] However, we must say we are very much surprised that the Buyers, who by virtue of the non-provision of refund guarantees were vested with a legitimate right of cancellation under the firm shipbuilding contracts and had opportunity to

> walk away from this project, have now sought to bring a claim for damages in respect of the first four (4) optional vessels.
>
> [3.2] Such a tactic is even more surprising to STX in circumstances where the two parties had recently been discussing the possibility of replacing the Aframax TK with alternative vessels, such as MR, LR1 or LNGC, in respect of which it may have been easier for STX to procure the necessary refund guarantees.

78. The e-mail then said, in its fourth paragraph, that it had become apparent that TT was not interested in alternative vessels, and sought confirmation in that regard:

> [4.1] Further to our meeting with Buyers which took place in London on 16 November 2013, it is now quite apparent to STX that Buyers have no interest in exploring the possibility of such alternative vessels being provided.
>
> [4.2] Assuming out understanding is correct, we would be grateful if we could receive your written confirmation to this effect so that STX do not need to waste any more time in considering and proposing alternative solutions to Buyers.

79. The fifth paragraph of the e-mail began by dismissing TT's claims in respect of the April option 1 vessels and, in its second sentence, by relying in that regard upon STX's oral agreement assertion:

> [5.1] In terms of the merits of your purported claims, we believe that these claims are premature and groundless.
>
> [5.2] As we mentioned in our previous correspondence, we are confident that our recollection of the discussions in Vancouver and over the phone is accurate and that the parties agreed to walk away from the optional contracts in the event it was not possible / viable for STX to procure refund guarantees.

80. The fifth paragraph of the e-mail then added, in the third sentence, a new assertion that the option agreement was "most likely" void for uncertainty:

> [5.3] More importantly, we would like to reserve our position that (according to our English counsel), the Option Agreement would most likely be regarded as void for uncertainty under English law, owing to the fact that the delivery dates (which are one of the most fundamental terms of the contract) were never fixed but were to be "mutually agreed" (essentially giving rise to an "agreement to agree").

81. The sixth paragraph dealt with the quantum of TT's November claim:

> [6.1] Furthermore, we consider that the quantum of your purported claims has been calculated erroneously and is vastly over-exaggerated.
>
> [6.2] The market price of the optional vessels bears no connection to the unrealistic prices quoted by STX in the context of its tender of Statoil project, which Builder has eventually decided to give up.

82. The seventh paragraph of the e-mail dealt with the way forward if TT had "a genuine interest" in pursuing contracts for the April option 1 vessels:

> [7.1] Notwithstanding your intention to claim damages from STX (which, for the reasons above, we consider would be unwise), we have always been willing, and remain willing, to explore the possibility of a commercial and/or amicable resolution, to the extent that one can be achieved.
>
> [7.2] Therefore, given that discussions regarding the possible provision of alternative vessels appear to have come to an end, the next step assuming Buyers do have a genuine interest in pursuing contracts for the four (4) optional vessels is for the parties to discuss and finalize mutually agreeable delivery dates for these vessels.
>
> [7.3] To this end, please could you let us have your proposals regarding the Buyers' preferred delivery dates as soon as possible?

83. The eighth paragraph of the e-mail returned to the position in relation to the firm SBCs:

> [8] Finally, for the avoidance of doubt, we would once again ask that the Buyers also confirm their agreement that the contracts for the four firm vessels can now be regarded as null and void such that neither party will have any enduring obligations or liability to the other.

84. The final substantive paragraph in the e-mail of 21 November 2013 was the ninth paragraph:

> [9] Given that additional time will be needed to resolve the above outstanding issues and for STX to complete its necessary internal procedures, we would ask that Buyers grant STX some further time to progress the optional contracts and that validity of the optional contracts be extended accordingly by way of mutual agreement.

B5.3 TT on 22 Nov 2013 exercises April option 2

85. On 22 November 2013 TT e-mailed STX a letter of that date exercising April option 2. The letter began by referring to TT's November claim. It continued:

> [2] With reference to the attached Option Agreement dated 5th April 2013, Teekay Tankers Ltd hereby exercises its options in respect of all four of the Second Optional Vessels as per clause 1 on the same terms as the contracts for STX Hull no.s S – 1672, 1673, 1674 and 1675 with logical amendments and at a price of USD 43,000,000 (United States Dollars Forty Three Million) per vessel.
>
> [3] Please advise us the relevant hull numbers so we can incorporate the relevant companies and also provide the shipbuilding contracts within 10 days from today (22nd November 2013), as per clause 5 of the Option Agreement.
>
> […]

B5.4 STX on 26 November sends April option 1 contracts

86. On 26 November 2013 Mr SM Kim e-mailed Mr Chan. The e-mail began by referring to TT's message of 22 November 2013. It continued:

> [2.1] Please note that given the circumstances that the refund guarantees for the firm four (4) vessels have not been procured, the possibility for the issuance of the RGs is very low
>
> [2.2] However, despite the fact that Buyer's declaration of the option is futile, without prejudice to our legal rights under the Option Agreement and in the meantime, we are willing to proceed with the documentation work in relation to the 1st optional vessels as the Buyer did not confirm its clear position as to whether or not they would continue the discussions regarding the possibility of replacing the Aframax Tankers with alternative vessels.
>
> [3.1] Moreover, we are shocked that the Buyer declared the 2nd optional vessels while we are awaiting your proposals regarding intended delivery dates of the 1st optional vessels which we asked in our message dated November 21, 2013.
>
> [3.2] In order to avoid any doubt, we would be grateful if we could first receive your written proposals for intended delivery dates of the 1st optional vessels.
>
> [3.3] In any case, as we hereby provide you with the contract draft for the 1st optional vessels, please review and let us have your comments, if any.
>
> [4.1] As to the 2nd optional vessels, we would like to continue the discussion after finalizing the contract of the 1st optional

vessels considering that the discussion for the 1st optional vessels is under progress.

[4.2] Please kindly confirm your acceptance.

87. The "contract draft" attached to the email did not identify a delivery date. There was a space in which a delivery date would need to be inserted, but that space was left blank.

B5.5 STX seeks replies to e-mails of 21 and 26 November

88. A further e-mail to Mr Chan was sent on 28 November 2013 by Mr SM Kim. He sought confirmation that Mr Chan had received STX's messages of 21 and 26 November. His e-mail added that STX looked forward to Mr Chan's reply.

B6. December 2013

B6.1 STX on 2 December sends April option 2 contracts

89. On 2 December 2013 Mr SM Kim sent Mr Chan another e-mail that was mistakenly headed "Without Prejudice". I shall refer to this email as "STX's 2 December option 2 contracts email". It was timed at 11:20am, and stated:

> [1] We refer to the Buyer's messages dated 14th and 22nd November, 2013 and our messages dated 21st, 26th and 28th November 2013.
>
> [2] First of all, we are very disappointed at the Buyer's silence.
>
> [3.1] We dispute that the first option for four vessels has expired.
>
> [3.2] We have not yet discussed any delivery dates for the respective four vessels and further we cannot enter into a contract unless you provide us with these dates.
>
> [4.0] Therefore, solely in the interest of resolving this matter, and entirely without prejudice to STX's rights, including – but not limited to – the legal arguments set out in our email of 21 November:
>
> [4.1] We would appreciate if we could receive your response to our request for the Buyer's intended delivery position of the first optional vessels.
>
> [4.2] With regard to the second optional vessels already declared by Teekay, we provide you with the draft of contract for the contractual Buyer's review.
>
> [4.3] In this respect, we have not yet discussed any delivery dates for the four second optional vessels and we would

> appreciate if we could receive the Buyer's proposals regarding the intended delivery.
>
> [5] We look forward to your response.

B6.2 STX's 2 December expedited hearing email

90. Later on 2 December 2013 Mr SM Kim sent Mr Chan an e-mail timed at 14:00. I shall refer to it as "STX's 2 December expedited hearing e-mail". The first paragraph referred to TT's messages of 14 and 22 November 2013 and to STX's messages of 21, 26 and 28 November 2013.

91. The second paragraph of the e-mail stated:

> [2.1] We consider that the position being adopted by the Buyers in unreasonable and we are disappointed that […] Buyers have been consistently evasive and have neglected to provide the information which STX require in order to finalise the shipbuilding contracts for the first optional vessels.
>
> [2.2] We do not agree that STX is in breach of the Option Agreement in respect of the first option vessels in circumstances where, notwithstanding STX's repeated requests, delivery dates were never agreed or even entertained by Buyers.
>
> [2.3] Furthermore, Buyers' aggressive and uncooperative attitude and premature cancellation of the first options has led us to query whether Buyers have any genuine interest in procuring the construction of the optional vessels, or whether they are simply looking for ways to claim damages from STX.

92. The third paragraph of the e-mail made a prediction and gave an indication of a proposal:

> [3.1] Taking account of Buyers' stance to date, we have every reason to believe that Buyers will adopt the same approach in relation to the second optional vessels and look for ways to throw up these contracts if the parties fail to reach agreement or some form of compromise in the interim.
>
> [3.2] With that in mind, we would like to propose a solution which we think would avoid the need for a protracted dispute and enable the parties to know where they stand.

93. The e-mail did not, however, immediately proceed to describe the proposed solution. Instead, the fourth paragraph expanded upon the prediction in sentence [3.1] quoted above, and envisaged that TT would again claim damages if contracts for the April option 2 vessels were not entered into before midnight on 2 December 2013.

94. In the fifth paragraph, the e-mail went on to identify five reasons why STX considered TT's claims in respect of the April option 1 vessels to be without merit. I shall refer to them as reasons [5.1] to [5.5]:

(1) Reason [5.1] referred to what had been said in STX's 21 November e-mail about the option agreement being void for uncertainty, and described this as being "in our view a good argument";

(2) Reason [5.2] noted that the firm SBCs had been entered into by subsidiaries of TT, and not by TT itself, and said that as no consideration has been provided by TT itself, "there is also an argument" that the option agreement was void for want of proper consideration;

(3) Reason [5.3] said that if there were an enforceable duty to enter into shipbuilding contracts, that duty was bilateral, with the result that there was "much scope for arguing" that TT was in breach of the option agreement in that regard;

(4) Reason [5.4] involved the following stages:

(a) In order to conclude shipbuilding contracts, STX needed to ascertain TT's desired delivery dates so that STX could ensure that the proposed construction schedules were feasible;

(b) Prior to fixing delivery dates STX would need to take into account the date by which it expected to be in a position to procure refund guarantees;

(c) Despite STX's requests, TT had not proffered desired delivery dates, and instead sought to terminate "without engaging STX whatsoever in respect of these outstanding contractual items";

(d) Therefore, to the extent that STX was under an obligation, TT were themselves under an implied obligation "to cooperate with STX in finalizing/ agreeing terms of the shipbuilding contracts" and/ or "not to do anything which would impede STX from finalizing and entering into those contracts";

(e) If that were correct, then TT was in breach of those implied terms;

(5) Reason [5.5] set out STX's oral agreement assertion, adding that in circumstances where STX have to date been unable to procure refund guarantees, TT was now "clearly reneging on that agreement".

95. It was in the sixth paragraph of the e-mail that Mr SM Kim set out STX's proposal:

> [6.0] Given that both parties believe they have a good case, we propose that the parties agree to suspend their disputes in relation to the first and second optional vessels and invite Buyers to attend an expedited hearing before the English High Court at which STX will seek the following declarations […]:

> [6.1] That STX is not in breach of the Option Agreement in respect of the first optional vessels due to the failure of Buyers to cooperate with STX in negotiating and finalising the terms of the shipbuilding contracts for these vessels.
>
> [6.2] That Buyer's purported cancellation of the Option Agreement in respect of the first options was premature and ineffective.
>
> [6.3] That, notwithstanding Buyer's purported cancellation of the first options, STX is under no obligation to construct either the first or second optional vessels until the Buyers notify STX of their desired delivery dates and such dates are agreed.
>
> [6.4] Alternatively, that the Option Agreement is void for uncertainty due to the absence of fixed delivery dates and/or for want of good and proper consideration on the part of Teekay Tankers.

96. The seventh paragraph of the e-mail stated that if TT were willing to proceed in accordance with STX's proposal, STX considered that an expedited hearing could be scheduled in January 2014. It continued:

> [7.2] In the event that STX is successful in obtaining the aforementioned declarations, that will of course be the end of the matter […].
>
> [7.3] Conversely, in the event that STX is unsuccessful in obtaining the aforementioned declarations and it is determined that STX does have an obligation to construct the first and second optional vessels, STX will of course be obliged to do so and the Buyers will have lost nothing.

97. The remainder of the e-mail said, among other things, that:

    (1) STX's proposal was "far more sensible" than proceeding to "full-blown arbitration or litigation";

    (2) if TT agreed, then STX would be grateful to have confirmation by return;

    (3) if the proposal were rejected then TT would have failed properly to mitigate its losses; and

    (4) STX looked forward to hearing from TT "as a matter of urgency".

B6.3 CDG's December letter to STX

98. There was no "confirmation by return" in response to STX's 2 December expedited hearing e-mail. The response which eventually came was a letter dated 18 December 2013 from CDG to STX ("CDG's December letter").

99. CDG's December letter began by explaining that CDG acted for TT "and its various subsidiaries" in relation to matters arising under the firm SBCs (which it referred to as "the Contracts") and the option agreement (which it referred to as "the Agreement"). Section A of the letter dealt with the firm SBCs. It rejected STX's oral agreement assertion, and it said that there was no basis in English law upon which STX was entitled to refuse to provide the required refund guarantees. Paragraph 7 of the letter said that STX's conduct in failing to provide refund guarantees over a period of approximately six months since May 2013, coupled with clear statements that STX could not or would not do so, constituted an obvious repudiatory breach by STX of each of the firm SBCs. It added that the firm SBC buyers accepted that repudiatory breach as bringing the firm SBCs to an end, except as regards STX's obligation to pay damages for loss of bargain.

100. Section B of CDG's December letter dealt with the option agreement. Paragraphs 10 to 14 gave an account of events between 3 October and 2 December 2013. Paragraph 15 took issue with assertions in STX's 2 December expedited hearing e-mail. Paragraph 16 added:

> However, we and our clients see little purpose in debating these issues with you at this stage and even less point in pursuing the proposals you have made to engage in some form of expedited hearing before the High Court in London.

101. As regards the April option 1 vessels, paragraph 17 of the letter stated:

> 17. Our clients' position in respect of the First Optional Vessels is as follows.
>
> a. They require you at the earliest opportunity to enter into contracts for these newbuildings on identical terms as the Contracts […]; and
>
> b. The delivery dates for the First Optional Vessels will be 31 March 2016, 30 June 2016, 30 September 2016, and 31 December 2016. Provided, however, that if you are able to show that deliveries within these timeframes are not achievable notwithstanding the exercise of your "best efforts" (as to which our clients will require substantial documentary evidence) our clients will be prepared to agree to defer the Delivery Dates for the First Optional Vessels to your first available building "slots" in 2017.

102. As regards the April option 2 vessels, paragraph 18 of CDG's December letter stated:

> 18. Our clients meanwhile reserve all of their rights under the Agreement and at common law in respect of the Second Optional Vessels.

B7. Events in 2014

B7.1 MFB's January letter to CDG

103. On 22 January 2014 MFB wrote a letter to CDG ("MFB's January letter"). The first part of the letter set out STX's response to section A of CDG's December letter, dealing with the firm SBCs. In summary:

(1) paragraphs 2 to 5 said that TT's claims under the firm SBCs were without validity as a matter of construction, as the obligation to provide a refund guarantee was not a condition properly so called;

(2) paragraphs 6 to 10 relied on STX's oral agreement assertion, referring to the alleged oral agreement as "the Agreement", and adding that the facts clearly supported a case of rectification or estoppel;

(3) paragraph 11 said that paragraphs 12 onwards were "without prejudice to STX's primary reliance on construction and the Agreement (or rectification/estoppel)";

(4) paragraph 12 asserted that the firm SBCs had been frustrated by STX's inability to procure refund guarantees;

(5) paragraph 13 said that the firm SBC buyers' purported termination was a repudiatory breach, which "is hereby accepted";

(6) paragraph 14 said that any right to terminate had been lost by keeping the firm SBCs alive, and that for this reason also the firm SBC buyers' purported termination was a repudiatory breach, which "is hereby accepted";

(7) paragraph 15 said that the damages claimed by the firm SBC buyers' were "on any basis seriously over-exaggerated".

104. The second part of MFB's January letter dealt with what it described as "the Option Agreements", but plainly was referring to what I have called the option agreement. As to this:

(1) after setting out clause 4 (see section B3.3 above) in paragraph 16, the letter in paragraph 17 stated:

> 17. Delivery Dates are crucial to any Shipbuilding Contract. There is no mechanism or means for ascertaining those dates in the Option Agreements if there is not agreement. Clause 4 does refer to a vague "*best efforts*" obligation but that does not address the problem, particularly as the span covered by the best efforts obligation is so wide. In our view the Option Agreements are void for uncertainty.

(2) paragraph 18 said that STX relied on STX's oral agreement assertion;

(3) paragraph 19, headed "Mutual agreement on delivery dates", stated:

> 19. When purportedly exercising the option on 3 October 2013, your client made no attempt to agree or suggest Delivery Dates. It is now unilaterally seeking to set delivery dates for the First Optional Vessels. That is a clear breach of the obligation "mutually to agree". Further our client is under no obligation whatever to show that it cannot deliver by those specific dates."

(4) paragraphs 20 and 21 of the letter, headed "Requirement to enter into terms", stated:

> 20. Your client requires ours "at the earliest opportunity" to enter into contracts for the First Optional Vessels "on identical terms". However, the contracts clearly cannot be on identical terms, because there is the critical question of Delivery Dates and Delivery Dates, on any view, have to be different. Teekay has attempted to solve that problem by dictating delivery dates. That is not the answer.
>
> 21. STX will be unable to procure Refund Guarantees for the First Optional Vessels and accordingly there is little/no point in drawing up contracts for them."

B7.2 CDG's February letter to MFB

105. By letter dated 6 February 2014 ("CDG's February letter") CDG replied to MFB's January letter. The first section of CDG's February letter dealt with the firm SBCs. It rejected the assertions in paragraphs 2 to 15 of MFB's 22 January letter, and gave notice of appointment by the firm SBC buyers of their arbitrator in respect of all disputes under the firm SBCs.

106. The second section of CDG's February letter dealt with the option agreement, and comprised six paragraphs lettered "J" to "O". Paragraph J stated:

> J. We note your view that the Option Agreement is void for uncertainty. Please advise us by return whether this is a simple expression of opinion on your part or whether the same represents your clients' formal position on this issue. In either event, such assertion is expressly denied; in circumstances in which the Option Agreement represented a significant incentive offered by your clients for the conclusion of the [firm SBCs], our clients take gravest exception to the proposition now put forward that the Option Agreement is legally invalid.

107. Paragraphs K, L and M of CDG's February letter, in effect, responded to and rejected paragraph 19 of MFB's January letter.

108. Paragraphs N and O of CDG's February letter stated:

> N. Your clients' failure to propose Delivery Dates compliant with their obligation to use "best efforts" to ensure deliveries of the First Optional Vessels and the Second Optional Vessels in 2016 and 2017 respectively (or to accept the Delivery Dates our clients have proposed in respect of the First Optional Vessels), coupled with their assertion that they will be unable to procure refund guarantees for the First Optional Vessels constitute the clearest evidence that your clients have no intention of honouring their obligations under the Option Agreement; our clients will furthermore rely as appropriate upon the terms of your response to the query we have raised with you at paragraph J above.
>
> O. Such breaches of the Option Agreement as we identify in N above plainly go to the root of the contract and are repudiatory in nature. This being the case, we hereby give you notice on behalf of [TT] that our clients accept such breaches as bringing the Option Agreement to an end and substituting therefor an obligation upon your clients to pay substantial damages for our clients' loss of bargain. We are discussing with our clients the quantum of their claims and will write to you again shortly by way of precursor to the commencement of High Court proceedings against your clients.

B7.3 STX on 20 March 2014 brings the Seoul claim

109. On 20 March 2014 STX filed a claim ("the Seoul claim") at the Seoul Central District Court seeking a declaration of the non-existence of an obligation. In that claim STX contended that TT had unreasonably exercised its rights under the option agreement and that, in any event, STX would have been discharged from any obligations under the shipbuilding contracts which were to be concluded pursuant to the option agreement.

C. Was the option agreement void for uncertainty?

C1. Uncertainty: introduction

110. In order to maintain the defence that the option agreement was void for uncertainty, STX founds its arguments on words in clause 4 which I italicise below:

> [4.1] The Delivery Dates for each [of the] Optional Vessels *shall be mutually agreed upon* at the time of [TT's] declaration of the relevant option
> [4.2] but [STX] will make best efforts to have a delivery within 2016 for each [of the] First Optional Vessels, within 2017 for each [of the] Second Optional Vessels and within 2017 for each [of the] Third Optional Vessels.

111. The words used in [4.1] plainly state that whenever TT declares its exercise of an option for a particular vessel, the parties must reach mutual agreement upon the delivery date for that vessel. Those words also plainly state that this mutual agreement must be reached at such time as TT makes its declaration. This ties in with clause 5 of the option agreement. Under clause 5, in the absence of agreement to the contrary, TT and STX must enter into the shipbuilding contract for the relevant vessel within 10 days of TT's declaration. What clause 5 envisages is that the terms of the shipbuilding contract will be the same as the terms of the firm SBCs, "logically amended". Those terms include, and proceed by reference to, a specific delivery date. It follows that, in respect of any vessel for which TT has made a declaration, the delivery date for that vessel must be identified before the contract can be entered into. But the four firm SBCs have specified delivery dates, each different from the other. It is difficult to see how it can be the case that, in respect of any vessel for which TT has made a declaration, a process of "logically" amending the terms of the firm SBCs could enable identification of a delivery date. Indeed, if this were the case then there would have been no need clause 4 of the option agreement.

112. Taken on their own, the words at [4.1] indicate that when concluding the option agreement the parties have not reached agreement on any specific method by which delivery dates are to be identified. What they have said in [4.1] is that the delivery dates are to be "mutually agreed". However it is common ground that the words at [4.1] are not to be taken on their own. The parties have added in [4.2] that STX "will make best efforts to have a delivery" within a time period which is specified for each category of option. In that regard the parties have modified the approach taken in the LOI options. Under the LOI options, while delivery was "to be mutually agreed", what had to be mutually agreed was a date which was "in any event to be within" the relevant time period for the particular category of option.

113. It is sometimes the case that if parties have not reached agreement on a significant part or parts of their contract, it may be that their intention is that there should be no binding relationship until the remaining part or parts have been agreed. TT was anxious to stress that this could not have been the position in the present case. In that regard, to my mind, TT was pushing at an open door:

    (1) paragraph 6 of the particulars of claim included an assertion ("TT's mutual intention assertion") that the parties intended that the option agreement be legally binding and enforceable;

    (2) in response paragraph 7 of the defence admitted that the LOI contemplated the parties' entry into a binding and enforceable option agreement, but in other relevant respects denied TT's mutual intention assertion;

    (3) this limited admission might have been thought to leave the way open for a positive case by STX that after the LOI the parties changed their minds and intended that the option agreement would not be legally binding;

    (4) no such positive case, however, was advanced by STX;

    (5) the result was that, as regards the position when the April contracts were made, STX's response to TT's mutual intention assertion was a bare denial.

114. STX was right not to advance any such assertion. As TT pointed out, the background and context showed an intention for the option agreement to be binding and enforceable:

(a) it was concluded pursuant to the LOI, the purpose of which was to bring about the signing of detailed binding agreements;

(b) the opening paragraph of the option agreement (paragraph [0.1] in section B3.3 above) showed that the making of the option agreement was part of a wider package under which, in order to secure the options for TT, the firm SBC buyers had entered into the firm SBCs; and

(c) it was in clause 6 of the option agreement that the firm SBC buyers were given the choice of additional coatings, thereby emphasising the link between the firm SBCs and the option agreements.

115. Accordingly my initial conclusion on the question of uncertainty is that TT succeeds on TT's mutual intention assertion. I hold that, at the time that the April contracts were made, the background and context showed a joint intention ("the binding option agreement intention") for the option agreement to be binding and enforceable. But, as TT conceded, the binding option agreement intention does not necessarily get TT home. The reason is that STX relies on the undoubted principle that if parties have intended to leave some essential matter to be agreed between them in future, on the basis that either party will remain free to agree or disagree about that matter, then there is no bargain which the courts can enforce.

116. TT does not dispute that identification of delivery dates for relevant vessels is an essential matter. TT accepts, in effect, that it must show that the court can treat the parties as having intended that if agreement were not reached on delivery dates then a method would be adopted under which they would be determined. If TT cannot show this, then the present claim must fail.

C2. Uncertainty: statements of case & framework at trial

117. As to the parties' intention if delivery dates were not agreed, TT addressed this in both its original particulars of claim and its amended particulars of claim. In paragraph 11 of the original particulars of claim TT made an assertion as to the true meaning of the words used in the option agreement, or a term properly to be implied into that agreement, or both:

> 11. […] On a true construction of that clause [clause 4] and/or by way of terms implied to give the Option Agreement business efficacy:
>
> (1) The Delivery Date in respect of each Optional Vessel was to be mutually agreed;
>
> (2) Failing which, the Delivery Date in respect of each Optional Vessel was to be:

> (a) Such date as STX offered, having used its best efforts to provide a delivery date within 2016 (for the First Optional Vessels) or 2017 (for the Second and Third Optional Vessels); and
>
> (b) In the event that STX was not able to offer a date within the relevant year despite using its best efforts, the earliest date thereafter which STX was able to offer using its best efforts.

118. Although the introductory words of paragraph 11 allowed for a contention that the provision set out in sub-paragraph (2) could be arrived at as a matter of construing the words used in the option agreement, no such contention was advanced at trial. What was asserted by TT at trial in this regard was a primary case that the provision set out in sub-paragraph (2) was properly to be regarded as an implied term of the option agreement. I shall refer to this proposed implied term as "the STX offer date alleged term".

119. Paragraph 12 of the original particulars of claim stated:

> 12. For the avoidance of doubt, it was not intended by the parties that STX should be at freedom to agree or disagree about the Delivery Dates in its own interests, such that [TT] might be deprived of the ability to exercise its options.

120. The original stance taken by TT was the subject of an addition in the amendments to the particulars of claim. The addition was that TT's amended particulars of claim relied upon an alternative implied term. In that regard a new sub-para (3) of paragraph 11 stated:

> (3) Alternatively to sub-paragraph (2), it was an implied term that the Delivery Date in respect of each Optional Vessel was to be an objectively reasonable date (having regard to STX's obligation to use its best efforts to provide delivery dates within 2016 or 2017 as appropriate), to be determined by the court if not agreed.

121. Thus the new paragraph 11(3) contended for an alternative implied term. I shall refer to it as "the reasonable date alleged term".

122. STX's response to paragraph 11 of the particulars of claim was in paragraph 10 of the defence. It set out the terms of clause 4 of the option agreement in subparagraph 10.a, and made assertions in subparagraphs 10.b and 10.c. In all other respects paragraph 11 of the particulars of claim was denied. The assertions in subparagraphs 10.b and 10.c were:

> b. On a true construction of clause 4, the parties were free to negotiate as regards the Delivery Dates, subject to STX's obligation to make best efforts to have a delivery within the years specified in clause 4.

> c. It is denied that there is any implied term as alleged or that clause 4 is to be construed as alleged in sub-paragraph (2) [of paragraph 11 of the particulars of claim]. The clause contained no effective mechanism for determining the Delivery Dates in the absence of agreement.

123. STX's response to paragraph 12 of the particulars of claim was set out in paragraphs 11 and 12 of the defence:

> 11. As regards paragraph 12, if what is intended by this paragraph is to contend that STX was constrained as regards its freedom to negotiate other than by reference to its obligation to make best efforts to have a delivery date within the identified years, it is denied.
>
> 12. Clause 4 of the Option Agreement was in effect an agreement to agree. As such, the Option Agreement was void for uncertainty and unenforceable.

124. Thus in paragraph 11 of the defence STX acknowledged that the option agreement provided for it to be under an "obligation to make best efforts to have a delivery date within the identified years". I shall refer to this as "STX's best efforts obligation". In so doing I do not pre-judge the question whether this was in law a binding obligation.

125. STX's amended defence did not specifically deal with the new subparagraph (3) in TT's amended particulars of claim.

126. TT's reply stated at paragraph 3, in relation to subparagraphs 10.b and 10.c of the defence:

> (1) Paragraph 10.b is denied. Whilst clause 4 of the Option Agreement was intended to enable the parties to seek to reach mutual agreement on Delivery Dates, it was not intended that the parties should be free to agree or disagree about Delivery Dates in their own interests such that, if agreement could not be reached in respect of Delivery Dates, there would be no obligation to enter into any shipbuilding contracts.
>
> (2) Paragraph 10.c is denied. On its true construction and/or by way of terms implied to give the Option Agreement business efficacy, the Option Agreement contained an effective mechanism for determination of Delivery Dates in the absence of agreement.

127. In these circumstances, as regards freedom to negotiate delivery dates under clause 4 of the option agreement, the framework for the argument at trial had four main features:

(1) STX accepted that the option agreement provided for it to be constrained by STX's best efforts obligation;

(2) STX advanced a contention ("STX's freedom to negotiate contention") that the intention of the parties was that, subject only to STX's best efforts obligation, they would remain free to agree or disagree on delivery dates;

(3) If STX's freedom to negotiate contention succeeded, then TT's claim in the present case would fail because the option agreement was not a bargain which the courts could enforce;

(4) If STX's freedom to negotiate contention failed, then the court should consider whether TT succeeds in its assertions as to the STX offer date alleged term or the reasonable date alleged term.

128. As will be seen below, however, my initial conclusion as to the binding option agreement intention has the consequence that features (3) and (4) above are interconnected. This is because relevant principles of contract law establish that, even though the parties' contract did not determine an essential matter, in a case where the parties intended that their agreement should be binding the court will seek to give effect to that intention. In particular, in such a case principles of contract law may permit implication of a term which provides a way of determining the undetermined matter. If so, then in the absence of some good reason to the contrary the court will imply such a term.

C3. Agreements to agree: principles of contract law

129. The law on agreements to agree was considered by the Court of Appeal in *MRI Trading AG v Erdenet Mining Corp LLC* [2013] EWCA Civ 156; [2013] 1 Lloyd's Rep. 638 ("*MRI*"). The factual background in *MRI* was that an earlier dispute had been the subject of a settlement agreement. Under the settlement agreement the parties agreed that they would enter into three future contacts for the sale and purchase of copper concentrates. After the first two contracts had been performed sellers declined to perform the third. They relied on the fact that provisions in the contract left certain matters, including particular charges and the shipping schedule, to be agreed. Arbitrators had concluded that sellers were right, with the result that there was no enforceable obligation to deliver the copper. An appeal by buyers under s 69 of the Arbitration Act 1990 came before Eder J. Eder J allowed the appeal, holding that the contractual provisions in question, properly construed, implicitly provided for the charges and the shipping schedule to be reasonable. His decision was upheld by the Court of Appeal.

130. In the Court of Appeal the leading judgment was given by Tomlinson LJ, with whom Pill and McCombe LJJ agreed. The parties in *MRI* agreed that the relevant legal principles were those summarised by the Court of Appeal in judgments in two earlier decisions. The first of these earlier decisions was *Mamidoil-Jetoil Greek Petroleum Co SA v Okta Crude Oil Refinery AD* [2001] 2 Lloyd's Rep 76, the relevant judgment being that of Rix LJ. The second was *B J Aviation Ltd v Pool Aviation Ltd* [2002] 2 P & CR 25, the relevant judgment being that of judgment of Chadwick LJ. The judgment of Tomlinson LJ in *MRI* set out extensive extracts from both these earlier judgments.

131. As to *Mamidoil,* Tomlinson LJ noted that at first instance in *MRI* Eder J had cited, with additional paragraph numbering for ease of reference, a list of relevant principles

set out at paragraph 69 of Rix LJ's judgment. I shall do the same, using Arabic rather than Roman numerals:

> 69. … the following principles relevant to the present case can be deduced …, but this is intended to be in no way an exhaustive list:
>
> (1) Each case must be decided on its own facts and on the construction of its own agreement. Subject to that:
>
> (2) Where no contract exists, the use of an expression such as 'to be agreed' in relation to an essential term is likely to prevent any contract coming into existence, on the ground of uncertainty. This may be summed up by the principle that 'you cannot agree to agree'.
>
> (3) Similarly, where no contract exists, the absence of agreement on essential terms of the agreement may prevent any contract coming into existence, again on the ground of uncertainty.
>
> (4) However, particularly in commercial dealings between parties who are familiar with the trade in question, and particularly where the parties have acted in the belief that they had a binding contract, the courts are willing to imply terms, where that is possible, to enable the contract to be carried out.
>
> (5) Where a contract has once come into existence, even the expression 'to be agreed' in relation to future executory obligations is not necessarily fatal to its continued existence.
>
> (6) Particularly in the case of contracts for future performance over a period, where the parties may desire or need to leave matters to be adjusted in the working out of their contract, the courts will assist the parties to do so, so as to preserve rather than destroy bargains, on the basis that what can be made certain is itself certain. …
>
> (7) This is particularly the case where one party has either already had the advantage of some performance which reflects the parties' agreement on a long term relationship, or has had to make an investment premised on that agreement.
>
> (8) For these purposes, an express stipulation for a reasonable or fair measure or price will be a sufficient criterion for the courts to act on. But even in the absence of express language, the courts are prepared to imply an obligation in terms of what is reasonable.
>
> (9) Such implications are reflected but not exhausted by the statutory provision for the implication of a reasonable price

> now to be found in section 8(2) of the Sale of Goods Act 1979 (and, in the case of services, in section 15(1) of the Supply of Goods and Services Act 1982).
>
> (10) The presence of an arbitration clause may assist the courts to hold a contract to be sufficiently certain or to be capable of being rendered so, presumably as indicating a commercial and contractual mechanism, which can be operated with the assistance of experts in the field, by which the parties, in the absence of agreement, may resolve their dispute.

132. As to *B J Aviation,* Tomlinson LJ noted that the relevant principles stated by Chadwick LJ were:

> 20. First, each case must be decided on its own facts and on the construction of the words used in the particular agreement. Decisions on other words, in other agreements, construed against the background of other facts, are not determinative and may not be of any real assistance.
>
> 21. Second, if on the true construction of the words which they have used in the circumstances in which they have used them, the parties must be taken to have intended to leave some essential matter, such as price or rent, to be agreed between them in the future – on the basis that either will remain free to agree or disagree about that matter – there is no bargain which the courts can enforce.
>
> 22. Third, in such a case, there is no obligation on the parties to negotiate in good faith about the matter which remains to be agreed between them—see *Walford v Miles* [1992] AC 128, at page 138G.
>
> 23. Fourth, where the court is satisfied that the parties intended that their bargain should be enforceable, it will strive to give effect to that intention by construing the words which they have used in a way which does not leave the matter to be agreed in the future incapable of being determined in the absence of future agreement. In order to achieve that result the court may feel able to imply a term in the original bargain that the price or rent, or other matter to be agreed, shall be a 'fair' price, or a 'market' price, or a 'reasonable' price; or by quantifying whatever matter it is that has to be agreed by some equivalent epithet. In a contract for sale of goods such a term may be implied by section 8 of the Sale of Goods Act 1979. But the court cannot imply a term which is inconsistent with what the parties have actually agreed. So if, on the true construction of the words which they have used, the court is driven to the conclusion that they must be taken to have intended that the matter should be left to their future agreement on the basis that either is to remain free to agree or disagree about that matter as

> his own perceived interest dictates there is no place for an implied term that, in the absence of agreement, the matter shall be determined by some objective criteria of fairness or reasonableness.
>
> 24. Fifth, if the court concludes that the true intention of the parties was that the matter to be agreed in the future is capable of being determined, in the absence of future agreement, by some objective criteria of fairness or reasonableness, then the bargain does not fail because the parties have provided no machinery for such determination, or because the machinery which they have provided breaks down. In those circumstances the court will provide its own machinery for determining what needs to be determined – where appropriate by ordering an inquiry (see *Sudbrook Trading Estate Ltd v Eggleton* [1983] AC 444).

133. Taken together, I shall refer to Rix LJ's 10 principles and Chadwick LJ's 5 principles as "the Rix/Chadwick principles". I add that they are not to be regarded as exhaustive: see *Mamidoil* at the start of paragraph 69.

134. In its skeleton argument in the present case STX relied on what was said, both by Hobhouse J at first instance and by the Court of Appeal, in *Didymi Corporation v Atlantic Lines and Navigation Inc.* I shall refer to the case as "*Didymi*". It is reported at [1987] 2 Lloyd's Rep 166 (Hobhouse J) and [1988] 2 Lloyd's Rep 108 (Court of Appeal). It is not mentioned in the judgments in *Mamidoil* and *BJ Aviation.*

135. *Didymi* concerned a vessel of that name which was the subject of a time charter party on the New York Produce Exchange form. The parties had agreed an additional clause 30, headed "Performance". It included the following:

> (1) … Should the actual performance of the vessel taken on an average basis throughout the duration of this charter party show any failure to satisfy one or more of [certain] representations, the hire shall be equitably decreased by an amount to be mutually agreed between owners and charterers but in any case no more than that required to indemnify the charterers to the extent of such failure…
>
> …
>
> (4) … If it is found that the vessel has maintained as an average during the period of the charter party a better speed and/ or consumption then those stipulated…, then owners shall be indemnified by an increase of hire, such increase to be calculated in the same way as the reduction provided in the preceding sentence [which in turn referred to a reduction in accordance with paragraph (1) above].

136. The court was asked to decide certain issues of law which were formulated as preliminary questions. Question 1 asked:

> 1. Whether [clause 30] is sufficiently complete and/ or certain and/ or clears as to constitute a concluded and enforceable agreement to indemnify owners by way of an increase of hire?

137. Hobhouse J's conclusion was that he should answer this question in favour of owners. He reached this conclusion because paragraph (4) used what were clearly intended to be words of obligation. Those words contemplated liability which was capable of calculation. Thus as regards paragraph (4) cases about "mere agreement to agree" were not relevant. If the effectiveness of the provision was to be attacked, then it must be because the liability was not capable of calculation or assessment, and therefore too vague or too uncertain to be the subject of a legally enforceable obligation. This was a matter to be considered subsequently, after examining questions concerning how the obligation was to be assessed.

138. Although it was not necessary to do so, Hobhouse J added at p.169 that even on the wording of paragraph (1) he would have found in favour of owners:

> However, even on the wording of paragraph (1) I do not consider it right to categorise the provision as merely an agreement to agree. The words of a contract are used objectively to state the intention of the parties to the contract. They may do so skilfully or clumsily, but the function of the court is to extract from the words used their objective intention. The words of this paragraph do not disclose an intention merely to require an agreement. The words "to be mutually agreed" are directory or mechanical and do not represent the substance of the provision. The substantive provision is that there shall be an equitable decrease in the hire.
>
> ….
>
> The relevant consideration in deciding whether the Court can and should give effect to a clause such as this depends upon whether or not the clause provides a sufficient criterion to enable the appropriate reduction or increase in hire to be determined. If there is, then the clause can be given effect to. If there is not, then it cannot.

139. The answer given by Hobhouse J given on question 1 was upheld in the Court of Appeal (Dillon, Nourse and Bingham LJJ). The first judgment was given by Bingham LJ. At pages 111 and 112 he discussed the earlier decision of the Court of Appeal in *Courtney Fairbairn Ltd v Tolaini Brothers (Hotels) Ltd* [1975] 1WLR 297. The Court of Appeal in that case was concerned with an agreement to "negotiate" fair and reasonable contract sums for building work. Lord Denning MR, with whom Lord Diplock and Lawton LJ agreed, held that the court could not recognize a contract to negotiate. Bingham LJ commented:

> It is, I think, plain from that report that this issue arose at the outset of the parties' relationship and concerned the existence of any contract at all between them. That is in contrast with the present case, where the parties were in a close and continuing

> contractual relationship for five years and the issue concerns one relatively minor aspect of their relationship.

140. Commenting further on the *Tolaini* case, Bingham LJ said that it appeared that the whole substance of the parties' relationship was unsettled, lacking agreement on contract terms, contract form and contract period among other things. The judge at first instance had found in favour of the plaintiff builders for there was a contract which could be enforced. Bingham LJ commented that if, rather than being overturned by the Court of Appeal, the judge's decision had stood:

> … the task of the court would, I think, have been not to attach a financial consequence to an obligation the parties had undertaken, but to define the substance of that obligation, that is, to make the parties' bargain for them. That is something the court will never do, and the Court of Appeal's decision accordingly seems to me with respect to be both right and inevitable.

141. Bingham LJ then turned to *Mallozzi v Carapelli S.p.A.* [1976] 1 Lloyds Reports 407. In that case a sale contract on c.i.f. terms provided for delivery at "one safe port" in a specified range in Italy. It added:

> First or second port to be agreed between sellers and buyers on the ship passing the Straits of Gibraltar.

142. What happened was that the c.i.f. contract cargo was on board a ship chartered by the sellers which also carried cargo for the sellers themselves. In relation to the sellers' own cargo, the sellers wished the ship to go to a port other than the one nominated by the buyers. The Court of Appeal held, first, that the c.i.f. contract did not give rise to any contractual duty to agree on the order of ports, and second that there was no duty to negotiate in good faith in that regard. Bingham LJ commented:

> That seems to me to be a very clear case. The parties' wishes and interests were irreconcilable, and only by their agreement could the problem be resolved. There was no objective standard which would enable the difference to be resolved, and accordingly no basis upon which any arbitrator or adjudicator could decide. The outcome of that case is, I think, so obvious as to be of little assistance.

143. Bingham LJ also referred to the reasoning of the House of Lords in the case cited by Chadwick LJ in his fifth principle (*Sudbrook Trading*). I need not set out that reasoning here: it sufficiently appears from the observations of Chadwick LJ in his fifth principle, as quoted above.

144. Bingham LJ concluded his discussion on this aspect by saying, applying the reasoning of *Sudbrook Trading* and *Tolaini*:

> I ask this question: Does the provision in issue in this case relate to an essential term of the agreement or to the existence of any contract at all, or does it relate to a subsidiary and non-

> essential question of how a contractual liability to make payment according to a specified objective standard is to be quantified? I consider that this provision falls plainly in the second category.
>
> The substantial provision … is that the –
>
> > Owners shall be indemnified by way of increase of hire, such increase to be calculated …
>
> The procedure for calculation is in my judgment a matter of machinery, and I conclude that there was here a binding obligation to which effect can be given as a matter of contract.

145. Nourse LJ agreed. At page 117, at an early stage of his judgment, he said:

> it has frequently been observed that the creature to which the law gives no effect is an agreement to agree on terms which are not specified. It has always given effect to an agreement to enter into some other agreement on specified terms, the classical example being an agreement to grant and accept a lease in the form of an annexed or scheduled draft. Here there is a plain agreement that in the circumstances specified the hire shall be equitably decreased. True it is that the amount is left to the agreement of the parties. But they can only agree a decrease which is equitable in amount. That looks very like an agreement to agree on specified terms.

146. At page 118 Nourse LJ quoted from the opinion of Lord Fraser of Tullybelton in *Sudbrook Trading*. Lord Fraser there observed that if an agreement were made to sell at a price to be fixed by a valuer who was named, or who, by reason of holding some office such as auditor of a company whose shares are to be valued would have special knowledge relevant to the question of value, the prescribed mode might well be regarded as essential. Nourse LJ commented:

> I would certainly accept that, if there had been a simple agreement for a decrease in the hire to be agreed between the owners and the charterers themselves, then the prescribed mode of agreement would have been essential and the agreement would have failed. But that is not the agreement which the parties have made. A purely objective standard has been prescribed. The parties can only agree upon an equitable decrease.

147. Also at page 118 Nourse LJ added that the importance of the distinction between an objective standard and a subjective one was pointed out in the opinion of Lord Diplock in *Sudbrook*. In the passage in question Lord Diplock pointed out that if a contract provided for a price to be fixed by a named individual applying such subjective standards as that individual thought fit, then it might be that refusal or inability of that individual to fix the price would result in the frustration of the contract. This was contrasted by Lord Diplock with the position in *Sudbrook*, where

the contract provided for each party to appoint a valuer, with the valuers (if they could not agree) in turn appointing an umpire. Nourse LJ continued:

> Accordingly, the parties having agreed upon an objective standard, it seems to me that the identity of those to whom the agreement is referred, albeit that they are the parties themselves, is of no real importance. It is just as if it had been referred to valuers or, … to nobody.
>
> For these reasons I am of the opinion that the prescribed machinery for agreeing the amount of the decrease in hire is subsidiary and non-essential, and, the machinery having failed, that the amount of the decrease can be assessed elsewhere.

148. Nourse LJ added that he considered that the decision of Hobhouse J had been based on an entirely correct principle. He also added:

> I desire to emphasize that my view of this case depends wholly on the parties' having prescribed a standard by reference to which their agreement as to the decrease was to be made. I do not intend to suggest that an agreement for sale, lease, charter or whatever at a price, rent, hire or other sum "to be agreed" between the parties to the agreement could be one to which the law would give effect.

149. Dillon LJ's judgment is at page 119. He took a rather different approach to that adopted by Bingham and Nourse LJJ. Dillon LJ's conclusion was that owners were entitled to rely upon the arbitration clause in the charter party as an answer to the assertion that clause 30 was a mere agreement to agree:

> The arbitration clause cures any defects in clause 30 as it stands alone, because it provides effective machinery for determining what the amount of the equitable increase or decrease under the clause should be… This is no mere agreement to agree without machinery to resolve any failure to agree.
>
> It is said that a failure to agree is something different from a dispute. That may in some contexts be so. If there is no agreement at all, and thus no contract at all, it might well be said that there could not be a dispute arising out of the contract within the arbitration clause, because ex hypothesi there would be no contract for it to arise out of and no arbitration clause binding between the parties. But here there is unquestionably a contract – a valid five year time charter of the ship. There is a difference amounting to a dispute on one minor aspect arising under one clause of that contract. That in my judgment is well within the arbitration clause.
>
> I would add that I do not for my part regard the decisions in [the *Tolaini* case] or [other] well-known cases…, in which it has been held that an agreement to agree is not an enforceable

> contract are in any way impaired by the decision in the House of Lords in *Sudbrook Trading* … That was concerned with an essentially different question.

C4. Other principles of contract law

C4.1 Other principles: introduction

150. As explained in section C2 above, the case advanced by TT at trial was that the option agreement was sufficiently certain because the court could imply into that agreement the STX offer date alleged term or the reasonable date alleged term. TT noted that the principles concerning implied terms were discussed by the Supreme Court in *Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72; [2016] A.C. 742 ("*Marks and Spencer*"). In section C4.2 below I set out an extract from the judgment of Lord Neuberger PSC in that case.

151. As also explained in section C2 above, TT asserted that the suggested implied terms were consonant with STX's best efforts obligation. Section C4.3 below contains observations about best efforts provisions.

C4.2 Implication of terms: general principles

152. The principles concerning implied terms were discussed by the Supreme Court in *Marks and Spencer*. Lord Neuberger PSC, with whom Lord Sumption and Lord Hodge JJSC agreed, said at paragraphs 16 to 27:

> 16 There have, of course, been many judicial observations as to the nature of the requirements which have to be satisfied before a term can be implied into a detailed commercial contract. They include three classic statements, which have been frequently quoted in law books and judgments. In *The Moorcock* (1889) 14 PD 64, 68, Bowen LJ observed that in all the cases where a term had been implied, "it will be found that … the law is raising an implication from the presumed intention of the parties with the object of giving the transaction such efficacy as both parties must have intended that at all events it should have". In *Reigate v Union Manufacturing Co (Ramsbottom) Ltd* [1918] 1 KB 592, 605, Scrutton LJ said that "A term can only be implied if it is necessary in the business sense to give efficacy to the contract". He added that a term would only be implied if "it is such a term that it can confidently be said that if at the time the contract was being negotiated" the parties had been asked what would happen in a certain event, they would both have replied: "'Of course, so and so will happen; we did not trouble to say that; it is too clear.'" And in *Shirlaw v Southern Foundries (1926) Ltd* [1939] 2 KB 206, 227, MacKinnon LJ observed that, "Prima facie that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying". Reflecting

what Scrutton LJ had said 20 years earlier, MacKinnon LJ also famously added that a term would only be implied "if, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common 'Oh, of course!'"

17 Support for the notion that a term will only be implied if it satisfies the test of business necessity is to be found in a number of observations made in the House of Lords. Notable examples included Lord Pearson (with whom Lord Guest and Lord Diplock agreed) in *Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board* [1973] 1 WLR 601, 609, and Lord Wilberforce, Lord Cross of Chelsea, Lord Salmon and Lord Edmund-Davies in *Liverpool City Council v Irwin* [1977] AC 239, 254, 258, 262 and 266 respectively. More recently, the test of "necessary to give business efficacy" to the contract in issue was mentioned by Baroness Hale JSC in *Geys v Société Générale* [2013] 1 AC 523, para 55 and by Lord Carnwath JSC in *Arnold v Britton* [2015] AC 1619, para 112.

18 In the Privy Council case *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266, 283, Lord Simon of Glaisdale (speaking for the majority, which included Viscount Dilhorne and Lord Keith of Kinkel) said that:

> "for a term to be implied, the following conditions (which may overlap) must be satisfied: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that 'it goes without saying'; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract."

19 In *Philips Electronique Grand Public SA v British Sky Broadcasting Ltd* [1995] EMLR 472, 481, Bingham MR set out Lord Simon's formulation, and described it as a summary which "distil[led] the essence of much learning on implied terms" but whose "simplicity could be almost misleading." Bingham MR then explained, at pp 481–482, that it was "difficult to infer with confidence what the parties must have intended when they have entered into a lengthy and carefully-drafted contract but have omitted to make provision for the matter in issue", because "it may well be doubtful whether the omission was the result of the parties' oversight or of their deliberate decision", or indeed the parties might suspect that "they are unlikely to agree on what is to happen in a certain … eventuality" and "may well choose to leave the matter uncovered in their contract in the hope that the eventuality will not occur." Bingham MR went on to say, at p 482:

> "The question of whether a term should be implied, and if so what, almost inevitably arises after a crisis has been reached in the performance of the contract. So the court comes to the task of implication with the benefit of hindsight, and it is tempting for the court then to fashion a term which will reflect the merits of the situation as they then appear. Tempting, but wrong. [He then quoted the observations of Scrutton LJ in the Reigate case, and continued] it is not enough to show that had the parties foreseen the eventuality which in fact occurred they would have wished to make provision for it, unless it can also be shown either that there was only one contractual solution or that one of several possible solutions would without doubt have been preferred …"

20 Bingham MR's approach in the *Philips* case was consistent with his reasoning, as Bingham LJ in the earlier case *Atkins International HA v Islamic Republic of Iran Shipping Lines (The APJ Priti)* [1987] 2 Lloyd's Rep 37, 42, where he rejected the argument that a warranty, to the effect that the port declared was prospectively safe, could be implied into a voyage charterparty. His reasons for rejecting the implication were "because the omission of an express warranty may well have been deliberate, because such an implied term is not necessary for the business efficacy of the charter and because such an implied term would at best lie uneasily beside the express terms of the charter."

21 In my judgment, the judicial observations so far considered represent a clear, consistent and principled approach. It could be dangerous to reformulate the principles, but I would add six comments on the summary given by Lord Simon in the *BP Refinery* case 180 CLR 266, 283 as extended by Bingham MR in the *Philips case* [1995] EMLR 472 and exemplified in *The APJ Priti* [1987] 2 Lloyd's Rep 37. First, in *Equitable Life Assurance Society v Hyman* [2002] 1 AC 408, 459, Lord Steyn rightly observed that the implication of a term was "not critically dependent on proof of an actual intention of the parties" when negotiating the contract. If one approaches the question by reference to what the parties would have agreed, one is not strictly concerned with the hypothetical answer of the actual parties, but with that of notional reasonable people in the position of the parties at the time at which they were contracting. Secondly, a term should not be implied into a detailed commercial contract merely because it appears fair or merely because one considers that the parties would have agreed it if it had been suggested to them. Those are necessary but not sufficient grounds for including a term. However, and thirdly, it is questionable whether Lord Simon's first requirement, reasonableness and equitableness, will usually, if

ever, add anything: if a term satisfies the other requirements, it is hard to think that it would not be reasonable and equitable. Fourthly, as Lord Hoffmann I think suggested in *Attorney General of Belize v Belize Telecom Ltd* [2009] 1 WLR 1988, para 27, although Lord Simon's requirements are otherwise cumulative, I would accept that business necessity and obviousness, his second and third requirements, can be alternatives in the sense that only one of them needs to be satisfied, although I suspect that in practice it would be a rare case where only one of those two requirements would be satisfied. Fifthly, if one approaches the issue by reference to the officious bystander, it is "vital to formulate the question to be posed by [him] with the utmost care", to quote from *Lewison, The Interpretation of Contracts* 5th ed (2011), p 300, para 6.09. Sixthly, necessity for business efficacy involves a value judgment. It is rightly common ground on this appeal that the test is not one of "absolute necessity", not least because the necessity is judged by reference to business efficacy. It may well be that a more helpful way of putting Lord Simon's second requirement is, as suggested by Lord Sumption JSC in argument, that a term can only be implied if, without the term, the contract would lack commercial or practical coherence.

22 Before leaving this issue of general principle, it is appropriate to refer a little further to the *Belize Telecom* case, where Lord Hoffmann suggested that the process of implying terms into a contract was part of the exercise of the construction, or interpretation, of the contract. In summary, he said at para 21 that "There is only one question: is that what the instrument, read as a whole against the relevant background, would reasonably be understood to mean?" There are two points to be made about that observation.

23 First, the notion that a term will be implied if a reasonable reader of the contract, knowing all its provisions and the surrounding circumstances, would understand it to be implied is quite acceptable, provided that (i) the reasonable reader is treated as reading the contract at the time it was made and (ii) he would consider the term to be so obvious as to go without saying or to be necessary for business efficacy. (The difference between what the reasonable reader would understand and what the parties, acting reasonably, would agree, appears to me to be a notional distinction without a practical difference.) The first proviso emphasises that the question whether a term is implied is to be judged at the date the contract is made. The second proviso is important because otherwise Lord Hoffmann's formulation may be interpreted as suggesting that reasonableness is a sufficient ground for implying a term. (For the same reason, it would be wrong to treat Lord Steyn's statement in *Equitable Life Assurance Society v Hyman* [2002]

1 AC 408, 459 that a term will be implied if it is "essential to give effect to the reasonable expectations of the parties" as diluting the test of necessity. That is clear from what Lord Steyn said earlier on the same page, namely that "The legal test for the implication of … a term is … strict necessity", which he described as a "stringent test".)

24 It is necessary to emphasise that there has been no dilution of the requirements which have to be satisfied before a term will be implied, because it is apparent that the *Belize Telecom case* [2009] 1 WLR 1988 has been interpreted by both academic lawyers and judges as having changed the law. Examples of academic articles include Chris Peters, "The Implication of Terms in Fact" [2009] CLJ 513, Paul S Davies, "Recent Developments in the Law of Implied Terms" [2010] LMCLQ 140, John McCaughran, "Implied Terms: The Journey of the Man on the Clapham Omnibus" [2011] CLJ 607 and JW Carter and Wayne Courtney, "*Belize Telecom*: a reply to Professor McLauchlan" [2015] LMCLQ 245 . And in *Foo Jong Peng v Phua Kiah Mai* [2012] 4 SLR 1267, paras 34–36, the Singapore Court of Appeal refused to follow the reasoning in the Belize Telecom case at least in so far as "it suggest[ed] that the traditional 'business efficacy' and 'officious bystander' tests are not central to the implication of terms" (reasoning which was followed in *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] SGCA 43). The Singapore Court of Appeal were in my view right to hold that the law governing the circumstances in which a term will be implied into a contract remains unchanged following the Belize Telecom case.

25 The second point to be made about what was said in the Belize Telecom case concerns the suggestion that the process of implying a term is part of the exercise of interpretation. Although some support may arguably be found for such a view in the *Trollope* case [1973] 1 WLR 601, 609, the first clear expression of that view to which we were referred was in *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd* [1997] AC 191, 212, where Lord Hoffmann suggested that the issue of whether to imply a term into a contract was "one of construction of the agreement as a whole in its commercial setting." Lord Steyn quoted this passage with approval in the *Equitable Life* case [2002] 1 AC 408, 459, and, as just mentioned, Lord Hoffmann took this proposition further in the *Belize Telecom* case [2009] 1 WLR 1988, paras 17–27. Thus, at para 18, he said that "the implication of the term is not an addition to the instrument. It only spells out what the instrument means"; and at para 23, he referred to "The danger … in detaching the phrase 'necessary to give business efficacy' from the basic process of construction". Whether or not one

agrees with that approach as a matter of principle must depend on what precisely one understands by the word "construction".

26 I accept that both (i) construing the words which the parties have used in their contract and (ii) implying terms into the contract, involve determining the scope and meaning of the contract. However, Lord Hoffmann's analysis in the *Belize Telecom* case could obscure the fact that construing the words used and implying additional words are different processes governed by different rules.

27 Of course, it is fair to say that the factors to be taken into account on an issue of construction, namely the words used in the contract, the surrounding circumstances known to both parties at the time of the contract, commercial common sense, and the reasonable reader or reasonable parties, are also taken into account on an issue of implication. However, that does not mean that the exercise of implication should be properly classified as part of the exercise of interpretation, let alone that it should be carried out at the same time as interpretation. When one is implying a term or a phrase, one is not construing words, as the words to be implied are ex hypothesi not there to be construed; and to speak of construing the contract as a whole, including the implied terms, is not helpful, not least because it begs the question as to what construction actually means in this context.

C4.3 Provisions as to "best efforts" to agree

153. In *Phillips Petroleum Co (UK) Ltd v Enron (Europe) Ltd* [1997] CLC 329 ("*Phillips Petroleum*") the Court of Appeal (Kennedy and Potter LJJ and Sir John Balcombe) was concerned with contractual provisions for the sale and purchase of gas from a particular North Sea block. For this purpose the seller was to construct the facilities necessary to extract and transport the gas to an existing pipeline, while the buyer was to construct facilities to receive the gas at Teesside. Key features of the contract, as summarised by Kennedy LJ, included the following:

> (1) Each party will use reasonable endeavours to co-ordinate the construction of its respective facilities so that completion of construction occurs at approximately the same time.
>
> (2) Each party will give various notices to the other relating to the progress of the construction of the facilities, leading to a narrowing period to be agreed for the date of delivery.
>
> In particular the seller gives the buyer three 'good faith' estimates of the time range within which the seller's facilities will be completed and the buyer will be capable of commencing deliveries. The first (24 months) notice is to specify a range of six months falling within the period 1 October 1995–27 September 1996; the second (nine months)

> notice is to narrow the six months range to three months within the same period; the third (four months) notice is to specify the final one month range within that period.
>
> (3) Upon receipt of each of the successive seller's notices, the buyer reciprocates with a good faith estimate of the date (falling no later than the range specified in the seller's notice) by which the buyer's facilities will be completed and they will be capable of accepting delivery of gas.
>
> (4) In parallel, each party will keep the other party informed at not more than 90 day (narrowing to 30 day) intervals of the progress of the design, construction and installation of each party's facilities.
>
> (5) The parties, must use reasonable endeavours to agree, not less than 30 days in advance, the date on which deliveries commence, i.e. the commissioning date, and the date of a three-day test (the 'run-in test') of the parties capability to deliver and receive oil. In the absence of earlier agreement, the 'long stop' dates provided for are 25 September 1996 for the commissioning date and 25–28 September 1996 for the run-in test.

154. At first instance Colman J granted a declaration stating in effect that, as regards feature (5) above, the buyer could refuse to agree a commissioning date only for reasons based entirely upon the technical or operational practicality of the proposed commissioning date. For this reason it would not be open to the buyer to refuse to agree a commissioning date because, at a stage prior to the long stop date of 25 September 1996, the market price of gas was lower than the price payable after the first delivery date. A majority of the Court of Appeal (Kennedy and Potter LJJ) disagreed. They considered that there was no basis in the contract for disentitling the buyer from relying on financial considerations. Much of their reasoning, and of the reasoning of Sir John Balcombe in dissenting, turned on detailed provisions in the contract. The case has relevance for present purposes, however, because the seller contended, among other things, that the buyer was under an implied obligation to use best endeavours to agree upon the commissioning date.

155. The contractual words in article 2.2, described by Kennedy LJ as "at the heart of the dispute", included a statement that the buyer and seller "shall use reasonable endeavours to agree …". In relation to this, Kennedy LJ identified four points which seemed to him to be "of some importance". The fourth of these points was:

> (4) Nowhere in this passage, or elsewhere in the contract, is any guidance offered as to the circumstances in which either party might be found not be using reasonable endeavours to agree. For example, the contract does not say that a party to the contract will not be regarded as making reasonable efforts to agree if its failure to agree to a commissioning date is attributable solely to its own financial interest, or is for any

reason other than the technical or operational practicality of the proposed commissioning date.

156. At p. 339 Kennedy LJ referred to a then recent decision of the House of Lords:

> In *P & O Property Holdings Ltd v Norwich Union* (1994) 68 P & CR 261 a developer and head lessor had each contracted to use 'reasonable endeavours to obtain' lettings of units in a shopping centre. The head lessor contended that in the circumstances the developer should have been prepared to pay to a tenant a reverse premium if a hypothetical reasonable landlord would regard such a premium as good estate management in current conditions, but the House of Lords, upholding the decision of the Court of Appeal, rejected that contention. In the Court of Appeal Steyn LJ said at p. 16A of the transcript:
>
> > 'The concepts of (a) "reasonable endeavours" obligation placed on both parties, and (b) the judgment of the "reasonable landlord" are inherently in tension. As a matter of ordinary commonsense they convey different ideas. The "reasonable endeavours" obligation necessarily imports the idea that the endeavours of the parties may fail to result in a letting, but neither is necessarily in breach. The judgment and approach of the parties may be at odds, but measured against a yardstick of reasonableness neither may be in breach of the 'reasonable endeavours' obligation. The reality is that the position of each party may be reasonably defendable. On the other hand, the standard of the "reasonable landlord" results in a single vindicated position.'
>
> Similarly, in the House of Lords Lord Browne-Wilkinson trenchantly rejected the submission that by agreeing to use reasonable endeavours the parties intended to impose an objective standard as to what terms it would be reasonable to agree to obtain a letting. …

157. At p. 340 Kennedy LJ referred to a then recent decision of the Court of Appeal:

> In *Little v Courage Ltd* (1995) 70 P & CR 469 an option to renew the lease of a public house had a condition precedent involving agreement on a new business plan. The tenant contended, amongst other things, that there was therefore an implied term that the landlord would use its best endeavours to reach agreement on a business plan, and as to that Millett LJ said at p. 476:
>
> > 'An undertaking to use one's best endeavours to obtain planning permission or an export licence is sufficiently certain and is capable of being enforced. An undertaking to use one's best endeavours to agree, however, is no different

> from an undertaking to agree, to try to agree, or to negotiate with a view to reaching agreement; all are equally uncertain and incapable of giving rise to an enforceable legal obligation.'

158. Kennedy LJ added at p. 341:

> … the critical words, that is to say the words requiring both parties to use 'reasonable endeavours' to fix a commissioning date do not even suggest when, in relation to the programme of work, the 'reasonable endeavours' should commence, or how the commissioning date should be triggered other than by agreement on-both sides or by the operation of the fall-back provision, and, as it seems to me, the omissions may well have been deliberate. … there were matters other than the completion of construction which the parties might reasonably have wished to take into consideration when fixing the commissioning date. Quite apart from considerations directly linked to the prevailing price of gas the buyer would, at the very least, want to be able to handle the gas, to pay for it, and to dispose of it when it began to flow, so he would need to have in position appropriate staff, appropriate finance, and appropriate contracts for re-sale. Yet, if the arguments now put forward by the sellers are correct it would seem to follow that at no stage, even if the work of construction was still far from complete, could the buyer object to a proposed commissioning date on the basis that, for example, the buyer had yet to complete the negotiation of a contract for re-sale.

159. When setting out the conclusion to his judgment, Kennedy LJ said:

> When the critical words in art. 2.2 are read in their contractual setting, and with regard to the ensuing fall-back provision, I find it impossible to say that they impose on the buyer a contractual obligation to disregard the financial effect on him, and indeed everything else other than technical or operational practicality, when deciding how to discharge his obligation to use reasonable endeavours to agree to a commissioning date prior to 25 September 1996. If the obligation were to be strait-jacketed in that way, that is something which to my mind would have been expressly stated, and, as Mr Pollock's argument really conceded, this is not a situation in which it would be appropriate for the court to imply a term, not least because it is unnecessary to do so for purposes of business efficiency. The fall-back provision expressly states what is to happen if no early commissioning date is agreed.

160. Potter LJ said at p. 343:

> … the unwillingness of the courts to give binding force to an obligation to use 'reasonable endeavours' to agree seems to me

to be sensibly based on the difficulty of policing such an obligation, in the sense of drawing the line between what is to be regarded as reasonable or unreasonable in an area where the parties may legitimately have differing views or interests, but have not provided for any criteria on the basis of which a third party can assess or adjudicate the matter in the event of dispute. In the face of such difficulty, the court does not give a remedy to a party who may with justification assert, 'well, whatever the criteria are, there must have been a breach in this case'. It denies the remedy altogether on the basis of the unenforceability in principle of an obligation which may fall to be applied across a wide spectrum of arguable circumstances. This case seems to me to afford a good example of the wisdom of that approach.

Even if I were satisfied (which I am not) on the basis of the facts agreed for the purposes of the issue that, by acting solely in its financial interests, the buyer has not made reasonable endeavours to agree a commissioning date prior to 25 September, the requirement of 'reasonableness' would nonetheless present acute difficulties to any court asked to decide from what date the buyer was in fact in breach and ought to be held liable in damages. For that purpose it might well be necessary to investigate at length, and form judgments upon, the availability of key personnel, designers or other specialists, the state and progress of the works, the stage at which the works might legitimately be regarded as ready from a practical and technical point of view including testing, the commitment of resources towards completion and finalisation of the facility, the completion of onsale arrangements and a variety of other considerations arguably reasonable to be taken into account before proposing and/or agreeing a commissioning date.

In all those respects, [the contract] utterly fails to reveal any express or implied criteria to be applied. Colman J appears to have found assistance on the-question of principle from the cases of *Sudbrook Trading Estates Ltd v Eggleton* and *Didymi*. Neither in my view affords real assistance to the seller's arguments in this case. The criteria in respect of the price and rate of hire to be agreed were respectively those of fairness and reasonableness in the first case and an equitable (which the court said meant 'fair and reasonable') decrease from a fixed rate in the second. The difference in nature and effect between prescription by the parties of an objective standard readily to be applied and a 'mere agreement to agree without machinery to resolve any failure to agree' is succinctly dealt with in the judgments of Nourse and Dillon L JJ in *Didymi* at pp. 118–119. The standard of fairness and reasonableness is an objective criterion to which the court is frequently willing to resort when

> determining a price or other sum not specifically agreed but readily assessable by reference to market rates and prices in the relevant sphere. No such straightforward or well-established exercise arises in a 'one-off' case of this kind in which no criteria have been specified and there are a variety of considerations which may legitimately operate in the minds of the parties in relation to their ability or willingness to agree-upon a specific date.

C5. Uncertainty: the arguments at trial

C5.1 TT's arguments on uncertainty

161. TT's first proposition was that the parties intended the option agreement to be a binding contract. My initial conclusion in section C1 above is that this proposition is plainly right. The present section of this judgment does not repeat the arguments which led to this initial conclusion. However TT expressly accepted that this initial conclusion is not a complete answer. I am concerned in this section only with arguments as to the further conclusions which the court should reach in the light of that initial conclusion.

162. Numerous previous court decisions were invoked by each side. They included the decisions referred to in sections C2 to C4 above. In so far as there were citations from other decisions, I do not set out these citations. They did not in my view add significantly to what was said in the descriptions of relevant principles set out in the decisions referred to in sections C2 to C4 above.

163. TT recognized that, even though the parties intended the option agreement to be a binding contract, it might be that no certain way could be identified of establishing what should happen if the parties failed to reach the mutual agreement contemplated in clause 4. As to that, however, TT stressed that the modern approach was for courts to be readier to find an obligation which can be enforced. This was so even though apparent certainty may be lacking as regards some term of the contract, if a means or standard can be found by which the content of that term could be determined.

164. The present case, submitted TT, clearly fell within Rix LJ's principles (4) to (8). In relation to those principles, and in relation to Chadwick LJ's five principles, TT's submissions can be broadly summarised:

    (1) The option agreement used the language of obligation in relation to both the agreement of a delivery date and the entry into a contract containing that delivery date: both clause 4 and clause 5 used the mandatory word "shall".

    (2) As to Rix LJ's principle (4), both sides were sophisticated commercial parties, familiar with shipbuilding and with the practice of granting options, and both parties believed they had a binding agreement and acted accordingly;

    (3) This is a case where a contract has "come into existence" for the purposes of Rix LJ's principle (5): see the signed LOI, option agreement and firm SBCs.

(4) The parties in the present case contemplated future performance over a period: under Rix LJ's principle (6) the courts will recognise the need to leave matters to be adjusted in the working out of the contract, and will assist the parties to do so, preserving rather than destroying bargains on the basis that what can be made certain is itself certain.

(5) Rix LJ's principle (7) was particularly apposite:

(a) STX had already derived the benefit in exchange for which it entered into the option agreement; it had secured the making of the firm SBCs;

(b) if STX could walk away from the option agreement, it would have received in full the benefit of obtaining the firm SBCs while depriving TT of a significant part of the consideration which TT had provided in return;

(c) the result of STX's current stance would be that the bargain made by the parties would become much more favourable to STX than the parties had intended;

(6) Rix LJ's principle (8) showed that even in the absence of express language the courts are prepared to imply an obligation in terms of what is reasonable;

(7) Turning to Chadwick LJ's five principles, TT described them as adopting Rix LJ's principles but going a little further;

(8) Chadwick LJ's first principle echoed Rix LJ's principle (1): each case must be decided on its own facts and on the construction of its own agreement;

(9) Chadwick LJ's second principle, repeated as part of Chadwick LJ's discussion of his fourth principle, set a high bar for STX: it had to show that the parties must be taken to have intended to have entered into the option agreement on the basis that either party was free to agree or disagree about the delivery dates, come what may;

(10) TT acknowledged that under Chadwick LJ's third principle, if STX surmounted the high bar, then there is no obligation on the parties to negotiate in good faith about the matter which remains to be agreed;

(11) As to Chadwick LJ's fourth principle, the court will strive to give effect to the parties' intention that their bargain should be enforceable, and in the present case should do so by implying a term;

(12) Chadwick LJ's fifth principle was the flip side of the fourth: where the matter was capable of being determined by some objective criteria of fairness or reasonableness, then the court will if necessary provide its own machinery for determining what needs to be determined.

165. Turning to *Didymi*, TT's opening submissions noted that STX relied upon this decision as warranting certain propositions. I shall refer to them as "STX's *Didymi* propositions". Those propositions, submitted TT, diverged from the Rix/ Chadwick principles. This submission was developed in TT's closing. STX's propositions

concerned two requirements which were said to arise before a court could find a binding contract to exist notwithstanding an express provision that the parties were to agree subsequently in respect of an essential term. The first *Didymi* proposition derived from *Didymi* a requirement that the court must be able to conclude that the parties' express provision for future agreement is merely machinery. The second *Didymi* proposition derived from *Didymi* a requirement that the future agreement machinery is underpinned by express words in the contract identifying a clear objective standard which, in the event of failure of the machinery, the court can apply. TT's submission was that the requirements in these propositions did not form part of the test identified in *MRI*. TT submitted that it confused matters to try to put the test into terms of whether the requirement that the parties agree was "machinery" or not. The true test was whether the objective intent of the parties was that if they could not agree a delivery date then both were free to walk away from the option agreement. In the present case, submitted TT, the objective intent was quite clearly that there should be a mechanism implied to enable them to reach agreement on the delivery date.

166. On the important question of whether the parties must be taken to have intended that either party will remain free to agree or disagree about the delivery date, TT added:

(1) the parties could not have intended that they remained free to agree or disagree about delivery dates in their own interest, so that STX could threaten to walk away from the agreement because it wanted to delay delivery in its own commercial interests, for this would denude the option agreement of its entire purpose;

(2) the parties could not have intended that an agreement setting out in detail everything other than the delivery dates would have amounted to nothing more than a non-binding indication of willingness to consider entering into future contracts; and

(3) the fact that the parties were given flexibility to determine the delivery dates when the options came to be exercised could not mean that they were free to agree or disagree as they wished. In that regard:

(a) the provision (in clause [4.2]) requiring STX to use its best efforts to have a delivery within specified time periods provided a clear starting point by reference to which the delivery dates could be fixed objectively; and

(b) a similar objective implied term had been found to exist in *MRI*, where a whole delivery schedule was left to be agreed;

167. On this basis TT submitted that the terms it proposed should be implied:

(1) because they would give the options commercial and practical coherence, reflect the parties' clear intention that the options should be legally enforceable, and uphold the parties' overall commercial bargain; and

(2) because the terms proposed by TT followed the grain of the express terms, did not contradict them, and would ensure that a carefully crafted agreement would not fail.

168. Further matters addressed by TT concerned, among other things, STX's best efforts obligation. On this, TT noted certain points taken in STX's skeleton argument and advanced contentions in relation to them. At this stage I make four observations about those contentions:

(1) Paragraph 38 of STX's skeleton described STX's best efforts obligation as a "provision by which the Builders [i.e. STX] are to agree to a date within 2016 or 2017 as the case may be". TT described this as a misreading of clause 4.

(2) Paragraph 38 added that the provision "demonstrates that the Builders were entitled to consider their own interests in deciding what dates to put forward: for example, they could prefer other contracts for construction of other ships over the construction of the ships contemplated by the Option Agreement." TT's response was that the words at [4.2] demonstrated exactly the opposite. TT added that:

(a) those words meant what they said: in the case of an April option 1 vessel, STX had to use its best efforts, it couldn't have regard to all its own commercial interests, and if it had a slot in 2016 then it should provide that slot to TT for the relevant vessel;

(b) if STX did not have a slot within the specified period the clear inference from the wording of the contract was that STX should provide the closest date possible thereafter;

(c) STX's best efforts obligation was not an open-ended provision enabling STX to have regard to all its commercial interests and say it couldn't or wouldn't provide TT with a delivery date until 2020, take it or leave it.

(3) Paragraph 39 of STX's skeleton asserted that "an obligation to use "best efforts" to propose or agree a delivery date is the paradigm example of a provision which is unenforceable; it is both an "agreement to agree", and there are no criteria against which the obligation can be measured". TT's response involved a number of assertions:

(a) there were criteria against which the obligation could be measured, namely whether STX had used its best efforts, and a court could readily determine whether that had been the case or not;

(b) the obligation on the part of STX was to use best efforts "to have a delivery" within the specified periods in the sense of "to provide a delivery date";

(c) an obligation to use best efforts to provide a delivery date was similar to an obligation to use best efforts to achieve a result such as the granting of an export licence;

(d) *Phillips Petroleum* showed that there was an important distinction between an obligation of that kind and an obligation to agree;

(e) that distinction had the consequence that observations in *Phillips Petroleum* about "best endeavours to agree" had no relevance to the present case;

(4) I asked whether "best efforts to have a delivery within" might refer to actual delivery rather than the delivery date in the SBC for the relevant vessel. In response, TT asserted that the word "but" in clause 4 was conditioning what was to be agreed: it would necessarily be the case that STX would have to be proposing its delivery date, it knew what slots were available, and the implication was that it would provide the initial proposal for a delivery date within the specified period.

C5.2 STX's uncertainty arguments: introduction

169. STX's arguments at trial, for present purposes, can be grouped into four categories:

(1) Arguments examining decisions which held a contract to be sufficiently certain even though it involved an express "to be agreed" provision for an essential term; and examining what additional features enabled the court to hold the agreement to be sufficiently certain;

(2) Arguments concerning the application of Rix LJ's principles (2), (3), (5) to (7) and (10);

(3) Arguments concerning the STX offer date alleged term; and

(4) Arguments concerning the application of Rix LJ's principles (4) and (8), and Chadwick LJ's second, fourth and fifth principles.

C5.3 STX's uncertainty arguments: categories 1 and 2

170. My analysis in section C6 below includes observations on the first category of STX's arguments. For reasons set out in that section it is neither necessary nor desirable to elaborate upon that first category here.

171. As to the second category, STX's arguments can be broadly summarised as:

(1) It is right that the present case falls within Rix LJ's principle (4), and that this indicated a joint intention that failure to agree on delivery dates should not destroy the bargain; but this is only of limited assistance to TT;

(2) Rix LJ's principles (2) and (3) applied where no contract existed, while principle (5) applied where a contract had come into existence, as to which TT said that the present case fell within principle (5) and not principles (2) and (3): but it was wrong for TT in that regard to suggest that mere existence of a document purporting to be a contract sufficed for this purpose;

(3) As to Rix LJ's principles (4) and (7), STX did not dispute that the present case concerns sophisticated commercial parties familiar with the business of shipbuilding; however STX submitted that the present is not a case where the parties have in fact acted on the belief that they had a binding contract;

(4) TT invoked Rix LJ's principle (6), saying that the availability of the yard and its delivery slots could not be predicted with certainty: STX responded that this was not a contract for a price-volatile commodity, and that there were "countless ways" that the parties could, if they wished, have fixed delivery dates at the time of the option agreement;

(5) Rix LJ's principle (10) noted that the presence of the arbitration clause could assist the court to hold a contract to be sufficiently certain or to be capable of being rendered so; in that regard STX observed that the firm SBCs contained an arbitration clause, and suggested that the court could conclude that the absence of an arbitration clause in the option agreement was deliberate.

C5.4 STX's uncertainty arguments: category 3

172. As to what I have called the third category of STX's arguments, concerned with the STX offer date alleged term, in broad summary:

(1) STX said that the proposed implied term, as set out in paragraph 11(2) of the particulars of claim, amounted to this: absent agreement, the delivery date would be the date offered by STX, or the earliest date which they might offer but did not offer;

(2) STX commented that this had no basis in the contract at all, and asked rhetorically why it should be concluded that the parties intended that the delivery date should be chosen by STX?

(3) In a contract which expressly stated that the delivery date for each optional vessel "shall be mutually agreed", STX submitted that there was no basis for substituting "the subject of unilateral declaration", or the earliest date which could have been offered by one of the parties: this would substitute the expressly chosen scheme with a wholly different scheme; and

(4) STX added that TT had failed to explain how this proposal could fulfil the ordinary criteria for the implication of a term in a contract: in truth the proposed implication was not complementary of the existing terms, but was a re-writing of the bargain.

C5.5 STX's uncertainty arguments: category 4

173. As regards what I have called the fourth category of STX's arguments, STX said, in broad summary:

(1) The judgments of Bingham and Nourse LJJ, agreeing with the approach of Hobhouse J, justified what I have referred to in section C5.1 above as STX's *Didymi* propositions;

(2) Rix LJ's principles (4) and (8) envisage an implied obligation in terms of what is reasonable: in that regard an implied term that delivery should be within a reasonable time is a familiar concept in a sale contract;

(3) This is not, however, a case where buyers sought to rely on an implied term of that kind: what needs to be identified for each optional vessel is a specific fixed delivery date;

(4) Identification of that date was integral to the operation of the delay, cancellation, and liquidated damages provisions of the firm SBCs; moreover the terms of the firm SBCs, as adopted for the purposes of the relevant optional vessel, did not permit STX to require TT to take delivery any earlier than the delivery date;

(5) It was perfectly conceivable that TT might not want an earlier delivery, which would advance dates of very significant payment obligations, perhaps in adverse trading conditions;

(6) Equally, STX might have any number of financial, commercial, operational or technical reasons for wanting a delivery date set either earlier or later;

(7) A range of interests on the part of STX and TT could be in opposition. STX might say that steel prices were at an all time high, and that they wanted to build much later when construction costs were expected to be lower; TT might say that charter rates were currently very high and so they wanted to take delivery as soon as possible: in such circumstances, there could not be an objective identification of a delivery date "in terms of what is reasonable"

(8) Turning to Chadwick LJ's second and fourth principles, TT advanced a contention that the parties could not have intended that they should remain free to agree or disagree about delivery dates in their own interest, since that would mean there was no obligation at all, thus denuding the contract of its purpose;

(9) STX responded that this contention simply reiterated the assertion that the parties intended the option agreement to be binding: the mere intention that the option agreement should be binding did not carry with it a necessary inference that the express requirement for mutual agreement of delivery dates did not mean what it said;

(10) Far from assisting TT, STX's best efforts obligation assisted STX:

(a) TT accepted that when making "best efforts" STX could have regard to availability of the yard and of delivery slots, in its own interests: if so, then STX must equally be able to consider its own interests in such matters as steel pricing, labour costs, and financing availability;

(b) An obligation to use "best efforts" to propose or agree a delivery date is the paradigm example of a provision which is unenforceable: see the observations of Potter LJ in *Phillips Petroleum* in section C3 above, explaining why parties may use a provision of this kind to describe an aspirational agreement which is not capable of being enforced;

(c) There was a lack of objective criteria to underpin the expressed need to agree the delivery dates;

(d) The fact that the parties had their own corners to fight in relation to delivery dates, as in *Phillips Petroleum*, precluded the possibility of imposing any particular "reasonable date" in the absence of agreement, and there was no basis for imputing to the parties such an intention;

(11) The passages from the judgments in *Phillips Petroleum* set out in section C3 above showed that where, as here, parties had expressly provided for mutual agreement, such a provision could be read down as directory only if two requirements were met:

(a) The provision for future agreement was merely an expression of the machinery of the contract rather than its substance; and

(b) The contract provided for a clear objective standard for the matter that was to be the subject of future agreement;

(12) Neither of the proposed implied terms satisfied these requirements.

C5.6 TT's submissions in reply

174. TT's submissions in reply included the following:

(1) As to STX's submission about Rix LJ's distinction between "contract" and "no contract" cases, this begged the question to a large degree, for on each occasion the court had to determine whether there was a contract;

(2) However one viewed it, in this case there was a document purporting to be a contract, that document arose out of the letter of intent which had spawned a package of contracts, that package included the option agreement, and the option agreement had been signed by the parties, contained terms which were all agreed save as to delivery date of optional vessels, and recorded that it was executed and signed as a contract;

(3) Moreover clause 6 of the option agreement was plainly an enforceable provision by reason of article 2(e) of the firm SBCs;

(4) As to *Phillips Petroleum*:

(a) The conclusion of Kennedy LJ's judgment was that there was no contractual obligation on the buyer to disregard financial aspects, but that was a case in which there was an express fallback provision;

(b) STX had conceded that there was an obligation to offer dates in accordance with the requirement to use best endeavours to have a delivery within a relevant year, and this assumed that delivery would be effected;

(c) While TT had conceded that STX could consider availability and delivery slots, it had not conceded that this consideration could be in STX's own interest;

(d) As to Potter LJ's observations, drawing attention to all the different variables that might apply, the task of identifying a reasonable delivery date might not necessarily be easy, but the court would have to look at the arguments put on both sides and form a view;

(e) The inference from STX's submissions was that what STX had to do was to design and build the vessel with or without a refund guarantee, and accordingly ability to obtain a refund guarantee would not be relevant to consideration of whether a delivery date proposed by STX complied with STX's best efforts obligation.

C6. Uncertainty: analysis

175. I can deal shortly with the first category of STX's arguments at trial. The arguments in this category sought to analyse certain decisions which held a contract to be sufficiently certain even though it involved an express "to be agreed" provision.

176. STX's first aim was to demonstrate how infrequently such decisions had been arrived at. It asserted that the reported cases involved only four such decisions, these being *MRI*, *Didymi* and two much earlier cases. In that regard TT objected that there had been no exhaustive analysis of reported cases. To my mind, the question whether there had been four such cases or a different number of such cases was irrelevant. The assertion made by STX added nothing useful to Rix LJ's observations when setting out his principles (2) and (5).

177. STX's second aim was to show that in the four cases in question the contracts were upheld for reasons that did not apply in the present case. For example, it was said that certain of the earlier cases had relied upon the existence of a provision for the matter to be decided by arbitration. In that regard STX's analysis was misconceived. In an earlier decision certain features may have led the court to conclude that the contract was sufficiently certain. It does not follow, and STX did not suggest that it followed, that in a case lacking one or more of these features the contract cannot be sufficiently certain. The common law develops by examining earlier decisions in order to identify the principle which governed those decisions. In *MRI* the parties agreed that those principles were, as set out in section C2 above, the Rix/ Chadwick principles. Turning to *Didymi*, there was, as I understand it, a contention by STX that the governing principle in that case was not taken account of in the Rix/ Chadwick principles. I examine this contention when dealing below with the fourth category of STX's submissions. Such principles as were identified in the other two cases cited by STX are fully taken account of by the Rix/ Chadwick principles.

178. I stress that I am not saying that the Rix/ Chadwick principles must be treated as if they had been written in stone. My observation is that, save for an exception in relation to what was said about *Didymi*, the first category of STX's arguments did not seek to identify any governing principle additional to the Rix/ Chadwick principles. Subject to that exception, the arguments falling within this first category did not advance STX's case.

179. As to the second category of STX's arguments at trial, I agree with STX's submission that the language of obligation in clauses 4 and 5 of the option agreement is of limited

assistance to TT. I have already concluded that the parties plainly intended that the option agreement should be binding. The language of obligation is consistent with that intention. TT itself accepts that the intention that the option agreement should be binding is not a complete answer.

180. I cannot fully agree with STX's next assertion, concerning Rix LJ's distinction between "contract" and "no contract" cases. STX is plainly right to say that the mere existence of a document which purports to be a contract is not what Rix LJ envisages when he refers to a "contract" case. Such a case will arise where there is an existing contractual relationship, and the disputed agreement is part of or linked to that contractual relationship.

181. That does not mean that the present case is a "no contract" case. The option agreement does not stand alone. As noted earlier, it is part of a package comprising the LOI and the April contracts. The option agreement itself identifies at [0.1] that the consideration received by STX for granting the options is, at least in part, the making of the firm SBCs.

182. The final agreed list of issues in the present case included at issue 1.3 a question whether the firm SBC buyers would have entered into the firm SBCs in the absence of the option agreement. I do not consider it necessary to decide this question. It suffices that, as recorded at [0.1], the option agreement was made on the basis that it was a benefit conferred by STX on TT because STX was being given the benefit of the firm SBCs. In those circumstances TT is fully entitled to say that an unenforceable option agreement would, by a windfall, give STX a far better package of agreements than it was entitled to expect. TT is also entitled to say that it would deprive TT of a benefit that all involved had envisaged would enure to TT as part of its role in the bringing about of the package of agreements. In these circumstances I have no doubt at all that the present is to be regarded as a "contract" case rather than a "no contract" case.

183. Nor am I persuaded by STX's assertion that the parties have neither acted upon nor performed the contract. First, on 2 October 2013, at a stage when there had been no suggestion that clause 4 rendered the option agreement unenforceable, TT exercised April option 1. Second, those who were parties to the package of agreements acted together on that package. In that regard TT played its part not merely in bringing about the making of the firm SBCs, but also in doing what it could to bring about their performance, among other things by correspondence and by taking part in meetings with STX.

184. I add that, for the purposes of Rix LJ's principle (7), it seems to me that TT has had to make an investment premised on the option agreement, for it has had to ensure that the firm SBC buyers entered into the firm SBCs; the option agreement at [0.1] expressly recognizes that this is a benefit to STX which is provided in order to obtain the grant of the options.

185. I cannot fully agree with STX's assertion as to Rix LJ's principle (8). No doubt the parties could have devised words in the option agreement fixing delivery dates or stipulating a method by which they would be fixed. Even so, it seems to me to be understandable that the parties would prefer to have a degree of flexibility so that dates could be fixed in the light of circumstances actually existing at the time of declaration of the option.

186. As to Rix LJ's principle (10), the option agreement contained no arbitration clause. I am content to assume that this was a deliberate choice. It does not seem to me that this assists STX. If there had been an arbitration clause then TT would have had an additional string to its bow. There was not, and so TT does not have that additional string. As indicated earlier, I have no doubt that the parties thought that the option agreement was a binding contract. In those circumstances, it would not be surprising if they thought that the option agreement was a short contract which was straightforward and was not such as to call for the expertise of an arbitrator.

187. In these circumstances I am not persuaded by STX's overall submissions in this second category. In my view TT is right to say that, applying Rix LJ's principles, this is a case where the court should strive to give effect to the bargain made by the parties if it is possible to do so. Accordingly, the only question remaining for consideration, as regards uncertainty, is whether one or other or both of the implied terms proposed by TT can, if necessary by striving in the way described by Rix LJ, properly be regarded as expressing the objective intention of the parties. The court's role in this regard requires careful consideration of the particular implied terms which TT claims provide an answer to the concerns identified by STX.

188. Thus I turn to STX's third category of submissions with a willingness to strive to uphold the STX offer date alleged term. Striving as I might, however, I cannot see any possible basis upon which this proposed term can be implied into the option agreement. It does not merely involve reading down the words "shall be mutually agreed upon" in clause 4. As STX rightly points out, it is wholly different from the scheme which is apparent from clause 4.

189. TT does not dispute that, in the event that STX offered a delivery date within the relevant year, the STX offer date alleged term would require TT to accept that date. This is rightly described by STX as a scheme under which the delivery date would be the subject of STX's unilateral declaration. In the event that STX were not able to offer a date within the relevant year using its best efforts, the STX offer date alleged term would require TT to accept the earliest date thereafter which STX was able to offer using its best efforts. This, too, is essentially a unilateral scheme. STX would be entitled to insist that the earliest date meeting this criterion would be the delivery date. There is no scope for TT to insist on consideration of some other date which might suit TT better.

190. I have not found in TT's submissions any satisfactory basis upon which the STX offer date alleged term can be said to fall within the principles concerning implied terms set out in section C4.2 above. In my view it is plainly inconsistent with what is said by Lord Neuberger PSC in paragraphs 16 to 23 of his judgment in *Marks and Spencer*. A unilateral approach seems to me so different from what was contemplated in clause 4 that neither side would have suppressed the officious bystander with "Oh, of course!" (see paragraphs 16 and 23). This is particularly so in relation to TT, which would, at the time that the option agreement was being negotiated, undoubtedly have wished to have some protection of its own interests. The STX offer date alleged term appears to me to be an example of a term fashioned with the benefit of hindsight. As noted by Lord Neuberger at paragraph 19, using hindsight to fashion a term which will reflect the merits of the situation as they now appear was described by Bingham MR as:

> Tempting, but wrong… It is not enough to show that had the parties foreseen the eventuality which in fact occurred they would have wished to make provision for it, unless it can also be shown either that there was only one contractual solution or that one of several possible solutions would without doubt have been preferred…

191. For the reasons given above, even with the utmost striving, it cannot possibly be said that the solution proposed in the STX offer date alleged term would without doubt have been preferred. In these circumstances I reject the original solution proposed in paragraph 11 of TT's particulars of claim.

192. This leaves the reasonable date alleged term. In section C5.5 I have identified 11 points made by STX in that regard. I must, and do, strive to find answers to those points.

193. Before turning to those points, I make two introductory observations in TT's favour. The first is that the reasonable date alleged term is not unilateral in character. The reason why the STX offer date alleged term failed is not a reason which applies to the reasonable date alleged term.

194. The second is that STX's *Didymi* propositions are put too high. In that case, construing the words used, the court was able to say that those words contained an objective standard and that, properly understood, the reference to future agreement was mere machinery. Owners did not need to establish an implied term, which involves different considerations: see Lord Neuberger's judgment in *Marks and Spencer* at paragraphs 22 and 27. STX's first proposition cannot, and as I understand it does not, rule out the possibility that an implied term may lead to the conclusion that the provision for future agreement is mere machinery.

195. Where I differ from STX in this regard concerns STX's second *Didymi* proposition. The judgments in *Didymi* do not seem to me to rule out an implied term which provided the necessary objective standard and thus enabled the court to conclude that the provision for future agreement was mere machinery. That said, however, consistently with Potter LJ's observations in *Phillips Petroleum*, they highlight the importance of the term (express or implied) being one which identifies "an objective standard readily to be applied".

196. In STX's fourth category, points (1) to (3) explain that the reasonable date alleged term differs from the familiar concept in a sale contract that, unless the contract provides to the contrary, delivery must be within a reasonable time. It is not suggested by TT that a term of that kind could be implied in the present case. STX is plainly right to point out that identification of a specific delivery date is integral to the operation of important parts of the SBC for the vessel in respect of which a relevant option has been exercised. It is not contested by TT that the date will be crucial to the operation of the delay, cancellation and liquidated damages provisions in that contract. Nor is it contested by TT that the specified delivery date gives TT protection in the sense that it cannot be required to take delivery any earlier.

197. STX's points (4) to (6) draw attention to the wide range of interests on the part of STX and TT which could be in opposition. An initial point made by TT in response is

a contention that STX had conceded that there was an obligation to offer dates in accordance with the requirement to use best endeavours to have a delivery within a relevant year. However, it does not seem to me that STX conceded that this was a binding obligation. The MFB January letter described it as a vague "*best efforts obligation*". The whole tenor of STX's submissions was that this was not an obligation which was capable of being enforced.

198. I noted earlier TT's contention that the reference in clause 4 to use best efforts "to have a delivery" within the specified periods meant "to provide a delivery date". This was confirmed by TT in response to my question whether those words might refer to actual delivery rather than the delivery date in the SBC for the relevant vessel. As to what this involved, there was plainly a concession by TT that STX could consider availability and delivery slots. I have no doubt that this is right: the opening words of the firm SBCs required, at what I have referred to as [0.2] and [0.3], that the relevant vessel be built, launched and equipped at the "Shipyard", this being STX's shipbuilding facilities (including those of affiliated or sister companies) in the Republic of Korea. Two aspects of this concession call for comment:

(1) In TT's reply submissions, while acknowledging that STX could have regard to availability and delivery slots, TT asserted that STX could not consider these matters "in STX's own interest". This does not seem to me to allow for commercial reality. When identifying a delivery date for the purpose of an SBC, STX has to make an estimate of what yard capacity it will have and, as regards the construction of the relevant vessel, when and for how long it will need to have available particular parts of the yard, raw materials, equipment, and teams of labour with particular skills. Making estimates about "availability" necessarily involves making estimates of all these factors. As STX points out, their availability will in turn depend upon what STX is prepared to pay, for example by way of overtime for particular types of skilled labour, or by way of price in order to obtain materials and consumables. On giving consideration to these matters it is difficult to see how STX can avoid having regard to its own interest.

(2) Moreover, it seems to me that the concession necessarily accepts that STX can have regard to financial considerations, at least in so far as they affect "availability" and "delivery slots".

199. TT's reliance upon clause 6 of the option agreement, in my view, puts the position too high. Article 2(e) of the firm SBCs simply incorporates the text of clause 6 for the purposes of those SBCs. Article 2(e) will thus have effect whether or not the option agreement is valid. What is said in article 2(e) cannot, of itself, render clause 6 of the option agreement enforceable if that agreement would otherwise be void.

200. Generally, as it seems to me, nothing in clause 4 of the option agreement envisaged any inhibition on TT acting in its own interest. This seems to me to be the case both in relation to a proposed delivery date during the year for which STX was to use "best efforts" and in relation to a proposed delivery date outside that year. Turning to STX, if it is the best efforts obligation which prohibits STX from having regard to its own interest, then in relation to dates outside the relevant year STX has no "best efforts" obligation and would be free of any prohibition on having regard to its own interest.

In these circumstances TT's reasonable date alleged term appears to me to be distinctly uncommercial.

201. TT submits that the use of reasonableness as a yardstick in the absence of a fixed time for performance is commonplace. I agree to this extent: where parties have failed to specify a time for performance, the court will often have little difficulty in implying a term that performance must take place within a reasonable time. TT cited several examples of cases of this kind. The considerations which arise in that regard are very different from the considerations which arise in a case where a precise date has to be specified. In seeking to identify the true intention of the parties, the court in the present case has to ask, "If their true intention was that the delivery date would be identified by determining what is reasonable, why did the parties state expressly in clause 4 that STX would "make best efforts" to identify a delivery date within the relevant year?" I can detect no satisfactory answer to that question. What was said about "best efforts" seems to me implicitly to recognize that the contrasting interests of the parties precluded the identification of a delivery date on the basis of what would be "reasonable".

202. I turn to points (7) and (8) in what I have called the fourth category of STX's arguments. They concern TT's contention that the parties could not have intended that they should remain free to agree or disagree about delivery dates in their own interest, since that would mean that there was no obligation at all. As to this:

(1) STX responds that the mere intention that the option agreement should be binding does not carry with it a necessary inference that the express requirement for mutual agreement of delivery dates did not mean what it said.

(2) This response by STX appears to me entirely consistent with the Rix/ Chadwick principles: while I must strive to find an implied term which will save the option agreement, I can only do this consistently with established principles for the implication of terms. If I am driven to the conclusion that the parties must be taken to have intended that either would remain free to agree or disagree about a proposed delivery date as its own perceived interest might dictate, there is no room for an implied term that in the absence of agreement the matter shall be determined by reference to an objective criterion of reasonableness.

203. Turning to whether I am driven to that conclusion, passages in *Didymi* and *Phillips Petroleum* strongly point to that conclusion. First, it is well established that there is a crucial distinction between agreeing to use best efforts or best endeavours to achieve a particular result, and agreeing to use best efforts or best endeavours to reach agreement upon an essential term in a contract. TT sought to bring itself within the first category by characterising STX's best efforts obligation as an obligation to provide the initial proposal for delivery date within a specified period. I can see no basis for thinking that clause 4 required one party or the other to provide the initial proposal. Clause 4 lays down no protocol as to how the parties should go about seeking to reach mutual agreement on delivery dates. If TT did not seek a delivery date within the relevant year, then there would be no need for STX to consider whether it could offer a delivery date within that year. If, however, TT sought a date within the relevant year, then clause 4 contemplated that STX would use best efforts, at least to provide a date within the year, if not the date which TT sought. But TT

remained free, in its own interests, to reject any date provided by STX. In this regard the reference to the use of "best efforts" is plainly, in my view, part of a process of seeking to agree upon an essential term in the relevant SBC. It is very different from valid and enforceable obligations to use best efforts to achieve a result.

204. TT pointed out that there were features which distinguished the present case from *Phillips Petroleum*. It is true that there were features of that case that are not found in the present case. One such feature is the provision made in *Phillips Petroleum* by way of fall-back. Kennedy LJ regarded this as an important feature. By contrast, however, it seems to me that the principles identified by Potter LJ are applicable irrespective of whether or not the parties have made a fall-back provision.

205. TT objected that this reasoning was incompatible with the Rix/ Chadwick principles. I do not agree. The reasoning above appears to me to be fully consistent with Chadwick LJ's second and fourth principles. It may be noted that Rix LJ's principle (8) did not say that when striving to preserve a bargain the courts will always be prepared to imply an obligation in terms of what is reasonable.

206. TT observed that in *MRI* the matters left to be agreed included a shipping schedule. The court had upheld an implied term that the shipping schedule would be reasonable. However, STX in my view is right to say that the shipping schedule in *MRI* is an entirely different category from the identification of delivery dates for a series of optional vessels. There are, as it seems to me, two important points of distinction. The first is that in commodity contracts of the type involved in *MRI* a shipping schedule is essentially a matter of routine. The second is that the dispute arose in a context where shipping schedules had been agreed in each of the two previous years. The circumstances of *MRI* fall within Potter LJ's observation that the court is frequently willing to resort to a standard of reasonableness when determining matters which are readily assessable by reference to the market. By contrast the present case falls clearly within Potter LJ's description of a "one off" case in which no criteria have been specified and there may be a variety of considerations which might legitimately operate in the minds of the parties in relation to their ability or willingness to agree upon a specific date.

207. TT said in its reply submissions that it had an answer to Potter LJ's observations. The answer was that, as regards the best efforts obligation, there would be matters to weigh in the equation on both sides. TT recognized that this would not necessarily be an easy task, but if there were a debate then the court would have to form a view. This does not seem to me to grapple with Potter LJ's observation. Taking an example given by STX, at the time of exercise of an option it might consider that high prices for steel were likely to persist during the period when steel would need to be bought if the delivery date were to be within the relevant year. It might also consider that after that period these prices were likely to fall. In such circumstances STX's desire to take advantage of the lower prices may conflict with TT's desire to have the relevant vessel delivered within the relevant year. It is not clear to me how "best efforts" or "reasonableness" can provide the court with a criterion enabling the parties' conflicting wishes to be reconciled. Echoing Bingham LJ's observations about the *Mallozzi* case, the parties' wishes and interests are irreconcilable, and only by their agreement can the problem be resolved.

208. I asked whether ability to obtain a refund guarantee would be a relevant consideration for this purpose. TT's answer simply relied upon an argument which featured in STX's submissions. That argument asserted that the contractual obligation on STX was to design and build relevant vessels, with or without a refund guarantee. I do not consider that this was a satisfactory answer. First, TT itself contended that this argument was wrong. Second, TT was right to say that the argument was wrong: see sections E2.2 and E 2.3 below.

209. For all these reasons I conclude that the best efforts obligation in the option agreement is, in Potter LJ's words, no more than "aspirational". Similarly I conclude that, to the extent indicated above, STX's submissions on the reasonable date alleged term are sound. Striving to the utmost, I cannot hold that this alleged term was an implicit part of the option agreement.

C7. Uncertainty: conclusion

210. For the reasons given above I am satisfied that neither of TT's alleged implied terms is capable of forming part the option agreement. TT has identified no other way in which that agreement, containing as it does express provisions for a future agreement on an essential term, can be saved. It follows that STX's uncertainty defence succeeds.

D. Repudiation/ renunciation

D1. Repudiation/ renunciation: introduction

211. If, contrary to my conclusion in section C above, the option agreement did not fail for uncertainty, then the next issue is whether TT was entitled to terminate the option agreement. For this purpose I assume that TT has established that the option agreement included either the STX offer date alleged term or the reasonable date alleged term. I also assume that, contrary to my conclusion in section C above, as regards the identification of the delivery dates STX was not entitled to rely upon its continuing financial difficulties.

212. The legal principles concerning repudiation and renunciation are not in dispute. The starting point was set out by TT in paragraphs 87 and 88 of its skeleton argument:

> 87. Party A is entitled to treat a contract as terminated, such that neither party has any further primary obligations to perform under the contract, where Party B demonstrates that it is unable or unwilling to perform the contract (renunciation) or commits a sufficiently serious breach of the contract (repudiatory breach) …
>
> 88. If Party A terminates the contract in the above circumstances, Party B (the defaulting party) becomes subject to a secondary obligation to pay Party A damages in order to

> compensate him for the loss he has sustained as a result of Party B's failure to perform its unperformed primary obligations (that is, "loss of bargain" damages) …

213. Paragraphs N and O of CDG's February letter (see section B7.2 above) set out the stance taken by TT when terminating the option agreement. It included the following elements:

(1) Paragraph N begins by referring to STX's "failure to propose Delivery Dates" compliant with their obligation to use "best efforts" to ensure deliveries of the [April option 1 vessels and April option 2 vessels] in 2016 and 2017 respectively. This was plainly an assertion that, in respect of each of eight vessels (the four April option 1 vessels and the four April option 2 vessels), STX was in breach of STX's best efforts obligation under clause 4 of the option agreement.

(2) Paragraph N then notes (in parenthesis) that STX had also failed to accept the delivery dates proposed in CDG's December letter. That letter (see section B6.3 above) specified delivery dates for the April option 1 vessels at the end of each quarter of 2016. In the alternative it stated that TT was willing to defer those dates, subject to proof that even by the exercise of "best efforts" they were not achievable, to STX's first available building slots in 2017. CDG's December letter did not propose dates for the April option 2 vessels. I observe that at this stage, if STX had agreed to the quarterly dates proposed in CDG's December letter, then that would remove any scope for TT to complain about an alleged breach of STX's best efforts obligation in relation to the April option 1 vessels.

(3) Paragraph N went on to say that the failure identified in element (1), coupled with STX's assertion that it would be unable to procure refund guarantees for the April option 1 vessels, constituted "the clearest evidence that [STX has] no intention of honouring [its] obligations under the option agreement".

(4) The final part of paragraph N of CDG's February letter concerned a passage in paragraph 17 of MFB's January letter. That passage included a statement that, "In our view Option Agreements are void for uncertainty." I note here that the MFB January letter appears to proceed on a basis that there was more than one option agreement. This was a mistake. As explained in section B7.1 above, I have proceeded on the basis that references in MFB's January letter to "Option Agreements" can be treated as if they referred simply to what I have called the option agreement. In this regard:

(a) CDG's February letter asked MFB to advise whether the quotation I have set out above was a simple expression of opinion on MFB's part or whether it represented STX's formal position.

(b) The final part of paragraph N in CDG's February letter asserted that TT would rely "as appropriate" upon the terms of that response;

(c) In the trial before me, however, neither side has made mention of any such response.

(5) The first sentence of paragraph O returns to breaches of the option agreement identified in paragraph N. As explained when commenting on element (1) above, these breaches comprised eight failures to comply with STX's best efforts obligation.

(6) The first sentence of paragraph O goes on to say that these breaches plainly went to the root of the contract and were repudiatory in nature.

(7) The second sentence of paragraph O includes formal notice that TT accepts these eight breaches as bringing the option agreement to an end.

(8) The second sentence of paragraph O added that the notice described in element (7) substituted for the option agreement an obligation on STX to pay damages for TT's loss of bargain. I deal with this obligation in section E below. STX does not dispute that if TT was entitled to terminate the option agreement, then STX will be obliged to pay damages for such loss, if any, as is properly recoverable by TT.

214. TT's case at trial involved a number of departures from what was said in paragraphs in N and O. One such departure was that TT's primary case at trial relied upon renunciation, rather than repudiatory breach. Indeed TT's skeleton argument, after explaining in paragraph 85 that TT's case was that STX had renounced the option agreement, said in paragraph 86:

> 86. Teekay also contends, further and in the alternative, that STX committed a repudiatory breach of the Option Agreement by failing to take the steps required on its part to enter into shipbuilding contracts in accordance with clause 5 of the Option Agreement, which breach Teekay accepted by terminating the Option Agreement at common law. It is accepted that, in practical terms, this argument adds little, if anything, to the renunciation case. That is because the reason why that breach was sufficiently serious to go to the root of the contract was because, in all the circumstances, STX's conduct demonstrated that there was no realistic prospect of it entering into shipbuilding contracts for any of the Optional Vessels within any commercially realistic period of time or at all. However, if that point has been made good, STX's conduct will also constitute a renunciation.

215. Returning to the explanation in paragraph 85 of TT's skeleton argument, I note in passing that it said that TT had accepted STX's renunciation. This does not seem to me to be accurate. CDG's February letter said in paragraph O that TT accepted the repudiatory breaches identified in paragraph N. In the event, nothing turns on this. STX accepts that if its conduct did indeed amount to a renunciation entitling TT to terminate, then STX cannot complain that the termination was in fact on the grounds of repudiatory breach rather than renunciation.

216. In the remainder of section D I shall adopt the order taken in TT's submissions at trial. Accordingly, in section D2 below I examine the arguments on renunciation. In section D3 below I examine the arguments on repudiatory breach.

D2. Renunciation

D2.1 Renunciation: introduction

217. Statements of principles have been identified by one side or the other and are not in dispute. In setting them out here, I use the same terminology as in section D1 which envisages a contract between two parties A and B, with party A asserting that it is entitled to treat the contract as terminated:

> (1) Renunciation occurs when B by words or conduct evinces an intention not to perform, or expressly declares that it is or will be unable to perform B's obligations under the contract in some essential respect.
>
> (2) The question whether there has been a renunciation depends on what a reasonable person would understand from B's conduct and the circumstances of the case.
>
> (3) This is to be judged by taking into account all of the circumstances prevailing at the time of the termination, including the history of the transaction or relationship. For example, in cases of late payment under a contract, late payment has been found not to justify termination where the delay in payment was very short and for understandable reasons, but has been held to justify termination where the late payment was substantial, persistent and cynical.
>
> (4) If party B says, "I would like to but I cannot", this negatives intent to perform just as much as "I will not".
>
> (5) Evincing an intention to perform in a manner which is substantially inconsistent with the contractual terms is evincing an intention not to perform.
>
> (6) Any renunciation must be clear and unequivocal: an ambiguous statement will not do, nor will a statement which merely casts doubt, even grave doubt, on the party's willingness to perform.
>
> (7) In order to constitute a renunciation, B's refusal to perform contractual obligations must relate to a matter going to the root of the contract.
>
> (8) Renunciation can occur before the time for performance arrives. A is not obliged to wait for the time for performance. The reason is that the renunciation, coupled with acceptance of that renunciation, renders the breach legally inevitable. This is sometimes referred to as an "anticipatory breach". The doctrine of renunciation enables A to anticipate B's inevitable breach, and to commence proceedings immediately.

218. There is a further proposition of law which calls for mention here. I do not understand it to be in dispute. The proposition is derived from Lord Wilberforce's speech in *Woodar Investment Development Ltd v Wimpey Construction UK Ltd* [1980] 1 WLR 277. It is this: mere reliance on a contractual entitlement to rescind does not of itself amount to renunciation of the contract.

219. I discuss below five matters identified by TT when asserting that STX renounced the option agreement. A sixth matter was canvassed by TT, but I do not need to mention it here. It proceeded upon an understanding of STX's case which STX has disclaimed. After discussing those five matters I set out my conclusion on TT's renunciation assertion, on the basis of the assumptions described in section D1 above.

D2.2 Alleged renunciation of the firm SBCs

220. The first matter identified by TT was its assertion that STX had renounced the firm SBCs. TT said that this shed light on STX's conduct in relation to the option agreement.

221. As regards renunciation of the firm SBCs, TT's amended Particulars of Claim advanced a contention that it could rely on principles of estoppel and of abuse of process. I make observations on that contention in section F below. In the alternative to that contention, TT relied on four renunciatory features ("the firm SBC renunciatory features") as showing that, by December 2013, STX had renounced the firm SBCs because a reasonable person would unquestionably have concluded, from STX's words and conduct, that STX did not intend to provide any of the refund guarantees, nor to build and deliver vessels under the option agreement at all.

222. Below I set out TT's description of its first firm SBC renunciatory feature. For ease of reference I have divided the description into subparagraphs (a) to (e):

> (a) STX had made clear that there was simply no prospect of any refund guarantees being provided *at all*.
>
> (b) The Firm SBCs did not comply with the creditor banks' guidelines and there was no chance of such approval being obtained without significant renegotiation of the commercial terms.
>
> (c) In the telephone call in October 2013, Mr Kim made clear that it was "not possible" to obtain refund guarantees and although STX "will continuously make application to bank", "the result will be the same".
>
> (d) The same message was conveyed in the letters of 21 and 26 November 2013.
>
> (e) There was nothing equivocal or temporary about STX's professed (and actual) inability to perform its obligations under the Firm SBCs.

223. In this description the relevant factual assertions are those in subparagraphs (b), (c) and (d). Taking them in turn, I start with subparagraph (b). There is no doubt that TT was correctly told on 20 June 2013 (see section B4.3 above) that the creditor banks would only approve projects which met sale guidelines, that "our project" does not meet the guidelines, and that this was because the price level and payment terms would result in STX facing losses for a prolonged period of time. It would accordingly be necessary to renegotiate the commercial terms if there were to be any prospect of the creditor banks agreeing to proceed. STX asserts that there was plenty of scope for changes of circumstances which might make obtaining refund guarantees, before the time for performance arrived, easier. However, STX had already been given an extension of time for a provision of refund guarantees. That extension had expired on 18 June. STX says that this was simply a deferral of the date at which it would be open to the firm SBC buyers to walk away from the contracts by reason of STX's failure to provide refund guarantees. However, the firm SBC buyers were perfectly entitled to insist on provision of the refund guarantees, and unless and until STX provided them, the contracts could not go ahead. What is relevant is what STX said about the prospects of provision of the refund guarantees before the delay was so great as to go to the root of the contract. STX now says that the guidelines might have changed or that commercial considerations might have altered. However, only one possible way in which the position might change was identified on 20 June 2013. This was that STX considered there might be a better chance of getting the refund guarantees once the VBNP was signed. In the event it was signed on 31 July 2013. A little over a week later, on 8 August 2013 (see section B4.5 above) STX told TT that the refund guarantee issue would be put back to the end of December. There was no hint of a relevant change in the position during the rest of August, in September, or the first half of October 2013.

224. As to subparagraph (c), the telephone call in question took place on 18 October 2013 (see section B4.8 above and Annex 2 below). Using the reference numbers in Annex 2, at [79] Mr S.M. Kim of STX, having said that STX was continuously trying to get a refund guarantee, stated that STX would continue to apply to the bank, "but result will be same". Mr S.M. Kim protested that STX would not walk away, but having done so went on at [115], saying:

> We are not going walk away but what is the point in the long run?

225. To my mind there was no doubt that in this conversation Mr S.M. Kim was communicating to TT STX's assessment of the commercial reality. STX could and would apply to the bank continuously, but the result would be the same. In the exchanges that took place towards the end of the conversation Mr S.M. Kim identified the only circumstances in which the bank might issue the guarantee. This might happen if TT could change the contractual terms, alternatively substitute contracts for other types of ships. The clear message being conveyed by Mr S.M. Kim was that, while neither side was going to walk away, there was no point in continuing with the existing contracts in the long run. The question asked at [115] was purely rhetorical.

226. Turning to subparagraph (d), relevant passages in STX's email of 21 November 2013 are set out in section B5.2 above. There was no suggestion that there was any prospect of refund guarantees being provided in accordance with the firm SBCs. The email noted, in what I have referred to as paragraph [2], that STX had made every possible

effort to obtain refund guarantees from the designated banks. The commercial backdrop to the email was not one in which any useful point would be served by waiting for a change in circumstances such as to enable issue of the refund guarantees. On the contrary, as set out in what I have called paragraph [3.2], the commercial position was one in which the two parties had recently been discussing the possibility of alternative vessels for which it might have been easier for STX to procure the necessary refund guarantees.

227. STX's email of 26 November is dealt with in section B5.4 above. This email was sent in relation to the exercise by TT of options under the option agreement. What I have referred to as paragraph [2.1] began by noting that the refund guarantees for the firm SBCs had not been procured. There was no suggestion that there was any prospect at all of procuring them in the future.

228. At the end of what I have called paragraph [2.1] TT added, "the possibility for the issuance of the RGs is very low". If this had stood alone, it might have been thought that STX contemplated some sort of real possibility that the refund guarantees might be issued. The next sentence, however, shows that this was not the case. It referred to, "the fact that Buyer's declaration of the option is futile…". The only possible reason for describing the exercise of the option as "futile" was that the possibility of issuance of the refund guarantees was so low as, in practical terms, to be non-existent.

229. Thus the assertions in each of subparagraphs (b), (c) and (d) are made good. They fully warrant the conclusions expressed in subparagraphs (a) and (e). I add in that regard that there were two contentions by STX in relation to a failure to provide a refund guarantee. The first was that such a failure did not constitute a breach of contract by STX. The second was that in any event the firm SBCs, properly understood, precluded a buyer from relying on such a failure as evidencing repudiation or renunciation. Detailed submissions on these contentions were advanced in relation to the quantum of TT's claim. For the reasons given in sections E2.2 and E2.3 below these two contentions have no merit.

230. TT's firm SBCs renunciatory feature (2) was:

> (2) Against that background, it was clear that STX would not build the Vessels. There was no real prospect of it building the Vessels in circumstances where it had not provided refund guarantees and, therefore, Teekay would not have to pay any instalments prior to delivery. To the contrary, as was obvious from what STX told Teekay, STX was wholly unable to finance construction of the Vessels given the lack of support from its creditors. STX's conduct and statements therefore amounted to a clear and absolute statement that the Vessels simply would not be built and delivered.

231. The conclusions drawn in this passage seem to me to be the inevitable consequence of the matters identified in TT's firm SBCs renunciatory feature (1). The reason why STX could not procure refund guarantees for the firm SBCs was because the firm SBCs were loss- making. STX's creditors would not countenance proceeding with them.

232. STX sought to rely upon passages in TT's internal communications. The monthly report emailed by Mr Chan on 27 October 2013 (see section B4.9 above) recorded that TT had exercised what I have described as April option 1 in relation to four new vessels. It commented that TT had been informed that "refund guarantees for these vessels are unlikely". This was not a reference to the firm SBCs: it was a reference to the April option 1 vessels. The other internal document relied upon was Mr Chan's email of 30 October 2013 (also dealt with in section B4.9 above). Mr Chan queried whether STX had "unequivocally said" that there would be no refund guarantees. It seems to me clear that the answer to be given to his question by a reasonable observer, aware of what Mr S.M. Kim had said in the telephone conversation on 18 October 2013, would have been that while STX had not "unequivocally said" this in so many words, STX had made it quite plain that this was the case.

233. A further contention advanced by STX was that, if STX were to utilise contractual provisions for an extension of time, the time when work on construction had to begin was some months away. This, however, does not change the position. However many months away that time may have been, what was being made quite clear by Mr S.M. Kim was that waiting for refund guarantees was pointless. This seems to me to be a clear example of a case falling within principle (4) quoted above. STX was clearly saying that it would like to be able to obtain refund guarantees, but that it could not and in the long term would not be able to do so. This negatives intent to perform the firm SBCs just as much as if STX were to say it would not perform them.

234. For the reasons given above I have no doubt that in October 2013, and again in November 2013, the words and conduct of STX was such as would lead a reasonable person to the conclusion that STX did not intend to fulfil its obligations under the firm SBCs. In these circumstances it is not necessary for TT to rely upon firm SBC repudiatory features (3) and (4). My comments on them will accordingly be brief. As to feature (3), this relied on contentions by STX in subsequent proceedings. These contentions by STX do not shed light on the position in October or November 2013: they were advanced subsequently. Feature (4) relied on STX's oral agreement assertion. TT said it was "itself renunciatory and gave further renunciatory colour to the failure to provide the refund guarantees." However, the position in October and November 2013 was that references to the alleged oral agreement were preceded or followed, and in some cases accompanied by, statements of willingness to provide TT with refund guarantees, if only they could be procured. In these circumstances the repudiatory element does not flow from STX's assertion of an unfounded oral agreement, but from its clear statements of the futility of persisting in waiting for refund guarantees, as identified above.

235. Thus I accept TT's assertion that STX renounced the firm SBCs. This is part of the background to my consideration whether STX renounced the option agreement. As to its relevance, however, I am not persuaded that TT's contentions are right.

236. Paragraph 99 of TT's skeleton argument asserted:

> 99. This is critical background to STX's conduct in respect of the Option Agreement because it provides the context for what STX was saying and doing in respect of the Option Agreement. The Option Agreement requires STX to enter into shipbuilding contracts which were materially identical to the Firm SBCs: the

> small increases for the Second and Third Optional Vessels of US$500,000 and US$1 million respectively above the prices in the Firm SBCs were immaterial, not least given (i) STX's position that its losses on the Firm SBCs would be US$3-4 million per vessel (in fact, STX's accountants calculated the loss as US$6.9 million per vessel) and (ii) the fact that the market had moved in Teekay's favour such that the options were even more disadvantageous to STX when exercised than the Firm SBCs. The commercial reality, as it would have appeared to any reasonable businessman, was that – if STX was unwilling and unable to perform the Firm SBCs because they did not meet with STX's creditors' approval – then it followed, as night followed day, that STX would be unwilling and unable to build and deliver the Optional Vessels on materially identical terms.

237. STX responded that the SBCs to be entered into in respect of optional vessels were different from the firm SBCs. In particular, the delivery dates would be different, and might be very far in the future. Accordingly, even if there was an inability or unwillingness to perform the firm SBCs, it was not logically possible to say that there must be an identical inability or unwillingness to perform the later contracts.

238. I agree with STX that in this regard TT has put its case too high. It is important in this regard that whether or not there has been a renunciation of the option agreement depends upon whether what has been said and done by STX would lead a reasonable person to the conclusion that STX did not intend to fulfil its obligations under the option agreement. As explained above, what STX had said and done in relation to the firm SBCs would lead a reasonable person to conclude that STX was saying it would like to provide refund guarantees under the firm SBCs but could not and would not be able to. A reasonable observer might well expect that in these circumstances STX would go on to say that it would like to enter into new SBCs for optional vessels as required by the option agreement, but that it could not do this. However, it could not necessarily be assumed that STX would go on to say this. What the court has to decide is whether, for whatever reason, STX acted in such a way as to lead a reasonable person to the conclusion that it did not intend to fulfil the option agreement, and this necessarily requires an examination of what STX said and did in relation to the option agreement.

D2.3 Renunciation: STX's statements & conduct

239. The second and third matters relied upon by TT were, respectively, statements and conduct of STX. It is convenient here to deal with some general observations by STX:

    (1) I accept submissions by STX that oral and written statements in English by STX employees cannot be treated as if they had been made by a person fluent in English. When considering such statements in respect of the firm SBCs I have made full allowance for this. When considering other statements below I also make full allowance for this. The position is different, however, as regards

communications which were sent by STX's lawyers, or had plainly been drafted by STX's lawyers.

(2) I do not accept submissions by STX that TT's conduct in relation to the option agreements included cynical attempts to trap STX into saying or doing things which would then be relied upon by TT as evidencing renunciation of the option agreement. TT was fully entitled to exercise the April options. By October 2013 they were "in the money" in the sense that the prices at which shipbuilders were willing to build Aframax vessels were much higher than those in the option agreement. If, contrary to my conclusion in section C above, the option agreement was enforceable then TT was entitled to enforce it. Steps taken by TT for this purpose appear to me to have been consistent with commercial good practice.

(3) STX identified what were said, in effect, to be two knockout blows. The first was that STX had provided TT with the draft contract for relevant vessels under April option 1 and April option 2. STX said that this was "entirely at odds" with a clear and unequivocal refusal to perform the option agreement. It added that the provision of these draft contracts was "entirely indicative of an expressed intention to perform" the option agreement. However, I do not accept that this is a knockout blow. When the draft contract wording was supplied, the space for the delivery date was left blank. No proposal as to delivery dates accompanied the draft contract wording. Submitting draft contract wording in these circumstances is not, of itself, indicative of an intention to perform the option agreement.

(4) STX's second knockout blow concerned STX's 2 December expedited hearing email (see section B6.2 above). That email, although signed by Mr S.M. Kim, was plainly drafted by STX's lawyers. It suggested a way forward under which the parties would abide by the decision of the court at an expedited hearing. STX relied upon *Woodar* as demonstrating that this was not a renunciation of the option agreement. It was, said STX, a clear indication of an intention to perform the option agreement if and when the time for performance arrived. As to this, however, the present case can be distinguished from *Woodar*. First, STX had not purported to exercise rights of rescission conferred by the option agreement. Second, STX's 2 December expedited hearing email proposed that the parties ask the court to resolve four questions. These questions, however, made no mention of STX's oral agreement assertion. As will be seen, STX's oral agreement assertion had not gone away. A reasonable observer, aware of what STX had said in respect of its oral agreement assertion would, at the very least, have good reason to doubt whether, in the absence of a specific reservation enabling STX to take advantage of the alleged oral agreement, STX would indeed sign up to the relevant SBCs in the event of an adverse decision at the expedited hearing.

240. Returning to the second and third matters relied upon by TT, when identifying statements and conduct for this purpose TT put on one side STX's oral agreement assertion and its uncertainty assertion. I deal with those two matters in sections D2.4 and D2.5 below. The statements relied upon by TT were contained in two emails and in MFB's January letter. The statements in question were set out, along with TT's comments on them, in TT's skeleton argument:

> (1) On 7 October 2013, Mr Kim stated that "… but we envisage that only documentations could be completed without RGs as explained above". This was an unequivocal statement that STX would only conclude shipbuilding contracts for the Optional Vessels without refund guarantees. This was fundamentally inconsistent with its obligations under clause 5 of the Option Agreement, which required STX to conclude contracts "…in the form and content identical to the Shipbuilding Contracts…".
>
> (2) On 26 November 2013, Mr Kim said that "… the Buyer's declaration of the option is futile…". This can only be understood as meaning that the exercise of the options would come to nothing.
>
> (3) On 22 January 2014, MFB (on behalf of STX) stated that "STX will be unable to procure Refund Guarantees for the First Optional Vessels and accordingly there is little/no point in drawing up contracts for them".

241. As to STX's conduct, TT noted that the email of 26 November 2013 had been accompanied by draft contract wording, but it simultaneously declared that the exercise of the options was "futile", indicating that the provision of the draft contract wording was "nothing more than a play for time". As to what happened after that, STX in the 26 November email had asked TT to propose delivery dates, but when TT did so in CDG's December letter, the response from STX in MFB's January letter was to declare TT's delivery dates to be in breach of the obligation "mutually to agree", to assert that STX was under no obligation to show that it could not deliver during 2016 using best efforts, and to assert that it was "not an answer" for TT to attempt to dictate delivery dates. A telling feature, submitted TT, was that STX did not seek to engage in any meaningful discussion of delivery dates.

242. The email dated 7 October 2013 is described in section B4.7 above. I do not accept that the email contained an "unequivocal statement" that STX would only conclude SBCs for the relevant vessels if those contracts excluded refund guarantees. The word "envisage" simply described what STX had in mind. It was not definitive.

243. STX maintained that the 7 October email clearly expressed an intention to perform the option agreement, citing the paragraphs which I have referred to as [4] and [6]. Taken at face value, the effect of passages in those paragraphs would be to say that STX was willing to prepare contractual documentation, and that, following TT's exercise of April option 1, STX would proceed in accordance with the option agreement. I do not think, however, that these passages can be taken at face value. They must be read having regard to the passage cited by TT. That passage contained a warning that what STX had in mind was only to conclude SBCs which did not contain refund guarantees.

244. The next statement relied upon by TT, referring to exercise of April option 1 as "futile", is found in STX's email of 26 November 2016. For the reasons given in section D2.2 above, I consider that STX was clearly conveying that the possibility of issuance of the refund guarantees was so low as, in practical terms, to be non-existent.

245. STX advanced submissions that the email indicated that STX would enter into relevant SBCs, and that the draft contract wording was attached. It added, as set out in paragraph 72b of its written closing notes:

> b. Mr Kim's statement that the option is "futile" again does not relate to the performance of the Option Agreement. It relates not to execution of the Optional SBCs, but to their performance afterwards. It is to be read in the light of the preceding sentence, which says that "the possibility for the issuance of the RGs is very low." That might or might not have led to problems with the performance of the Optional SBCs; a matter irrelevant to the Claimants' case

246. These submissions by STX do not recognize the commercial reality. The draft contract wording included the requirement that STX provide refund guarantees. The question remained whether STX would be willing to agree delivery dates and sign SBCs committing it to fulfil contractual obligations in circumstances where it would not be able to provide refund guarantees, and, indeed, did not have approval from its creditors to enter into such contracts. In the absence of proposed delivery dates the draft contract wording did not take matters further to any significant degree. The failure to propose delivery dates pointed strongly to a continued unwillingness on STX's part to enter into SBCs in circumstances where it was clear that STX would not be able to supply refund guarantees.

247. The third statement relied upon by TT concerned the "little/ no point in drawing up contracts" assertion in MFB's January letter. To my mind, there can be no doubt that this was a commendably frank statement. It recognised the commercial reality that STX's creditors would not finance any part of what can be called "the TT project", using this term to mean the performance by STX of the April contracts. As to the circumstances which TT relied upon as showing that a reasonable person would conclude that STX did not intend to fulfil the option agreement, STX recognized that the MFB January letter did not contain express assertions of intention to fulfil the option agreement. Nonetheless:

(1) STX pointed out that MFB's January letter did not withdraw previous offers of performance. As to that, however, for the reasons given above those so called "offers of performance" were of no real value in the absence of any proposal by STX of delivery dates.

(2) STX pointed out that MFB's January letter did not disavow the offer of an expedited hearing. As to that, however, if the offer of an expedited hearing was still on the table, one would have expected it to be mentioned here. Moreover, MFB's January letter differed significantly from the 2 December 2013 email: it put STX's oral agreement assertion at the forefront of STX's stance.

(3) STX asserted that the passage relied upon by TT ("little/ no point in drawing up contracts") related to the possible impact upon the performance of the relevant SBCs once they had been signed: observations about the futility or pointlessness of entering into such contracts did not, submitted STX, amount to any statement that STX would not enter into such contracts, let alone a clear and unequivocal one.

248. I do not consider that a reasonable observer would regard any of these submissions as commercially realistic. The constant theme of communications from October 2013 onwards was that refund guarantees could not be provided. The reason that they could not be provided was that STX's creditors would not countenance the spending of money on the TT project, for each element of that project would simply result in additional losses to STX. As regards what was said in MFB's January letter, the absence of any express statement that STX intended to fulfil the option agreement speaks volumes.

249. The reasonable observer would, to my mind, take what was said, and not said, in the 7 October and 26 November emails and in MFB's January letter together with the features of STX's conduct identified by TT. On doing so, I consider that TT is right to say that the reasonable observer would conclude it to be clear that STX did not intend to fulfil its obligations under the option agreement.

D2.4 Renunciation: STX's oral agreement assertion

250. In the circumstances described above it is not necessary for TT to rely upon the repeated statements by STX concerning its oral agreement assertion. That being the case, I can deal with it shortly. For the reasons given in section D2.1 above, I consider that in October and November 2013 what had been said by STX about the alleged oral agreement, if other matters are put on one side, did not amount to a clear statement that STX would not intend to fulfil its part of the option agreement. To my mind, however, the position changed in the light of MFB's January letter. STX asserts that this letter did no more than give an overview of points raised previously, including a short reference to the alleged oral agreement. I do not agree. The MFB January letter dealt extensively with the alleged oral agreement in paragraphs 6 to 10. It stated that subsequent paragraphs of the letter were without prejudice "to STX's primary reliance on" among other things, the alleged oral agreement, or rectification/ estoppel in that regard. Paragraph 18 of MFB's January letter expressly relied upon the oral agreement as barring the exercise by TT of any options in the event that refund guarantees were not available in respect of the firm vessels. Accordingly, if necessary, I would have concluded that for this reason, also, by the time of CDG's February letter STX had renounced the option agreement.

D2.5 Renunciation: STX's uncertainty assertion

251. What was said in MFB's January letter in relation to alleged uncertainty was couched rather differently from what was said in relation to the alleged oral agreement. As was acknowledged in paragraph J of CDG's February letter, it could be read as no more than a simple expression of opinion rather than a statement of STX's formal position. In these circumstances it does not seem to me that it can assist TT's claim that there was a renunciation of the option agreement. However, for the reasons given above, TT does not need such assistance.

D2.6 Renunciation: conclusion

252. For the reasons given above, if my conclusions in section C above were incorrect, then I would have held that STX was liable to TT because TT had been entitled to terminate the option agreement by reason of STX's renunciation of that agreement.

D3. TT's allegation of repudiatory breach

253. TT's particulars of claim identified a repudiatory breach by STX in relation to clause 5 in the option agreement. It was said, first, that STX was in breach by failing to enter into SBCs for the April option 1 and April option 2 vessels. It does not seem to me that matters reached a stage where there was agreement upon the terms of any such contracts. If I am wrong in my conclusion in section C above then one possibility is that the STX offer date alleged term took effect. If so, the relevant breach of contract would not arise under clause 5, but under clause 4. The other possibility is that the reasonable date alleged term took effect. If so, it will be necessary for TT to identify what it said were the reasonable delivery dates. It has not done so. Accordingly I conclude that this way of putting TT's allegation of a breach of clause 5 does not succeed.

254. The alternative way in which a case was put was that STX had failed to take steps necessary on its part in order to conclude the relevant contracts. This, however, is not what clause 5 requires. It seems to me that if TT were to make good an assertion of breach of the option agreement in this regard, it will be necessary for it to specify which of the alleged implied terms it relied upon and how STX was in breach of those terms.

255. Thus I am not persuaded that TT has made good its assertion of repudiatory breached pleaded in the particulars of claim. For the reasons given above, this has no impact upon the conclusion reached in section D2.6 above that TT was entitled to terminate the option agreement.

E. Quantum of damages

E1. Quantum: introduction & a fundamental principle

256. If I am correct in my conclusion that the option agreement is too uncertain, then there is no question of any award of damages to TT. Lest that conclusion be wrong, however, in this section I deal with the parties' submissions on quantum of damages. For that purpose I proceed on the assumptions described in section D1 above.

257. There is no dispute as to the fundamental principle for assessing damages in a case of this kind. The damages are compensatory, in the sense that the award of damages is made to compensate TT for loss of bargain. In this case the bargain that has been lost is the promised performance by STX of the option agreement. In the words of Parke B in *Robinson v Harman* (1848) 1 Exch 850, 855 the injured party is:

> … so far as money can do it to be placed in the same situation with respect to damages as if the contract had been performed

258. When citing Parke B's words at paragraph 14 in his judgment in *Bunge SA v Nidera BV* [2015] UKSC 43; [2015] 2 Lloyd's Rep. 469, Lord Sumption JSC added:

> In a contract of sale where there is an available market, this is ordinarily achieved by comparing the contract price with the price that would have been agreed under a notional substitute contract assumed to have been entered into in its place at the market rate but otherwise on the same terms.

259. TT says that, applying the fundamental principle, its losses arising from termination of the option agreement were very substantial. In support of that assertion, it points to the undoubted fact that, at the time of CDG's February letter terminating the option agreement, the prices at which other shipyards were willing to build Aframax tankers were very much higher than those stipulated in the option agreement.

260. By the time of CDG's February letter terminating the option agreement, TT had exercised April option 1 in respect of four vessels and April option 2 in respect of a further four vessels. Vessels which were to be built pursuant to the exercise of these options are referred to below as "the April option 1 vessels" and "the April option 2 vessels" respectively. Similarly, the shipbuilding contracts which were to be entered into for the April option 1 vessels and the April option 2 vessels are referred to below as "the April option 1 SBCs" and "the April option 2 SBCs".

261. As regards April options 1 and 2:

(1) At trial STX accepted that if it were found liable to TT, it would be required to compensate TT for such loss, if any, as TT had sustained because of the loss of STX's bargain to enter into the April option 1 SBCs and the April option 2 SBCs. A contention ("STX's nil loss contention") was advanced by STX to the effect that the amount of any such loss was nil.

(2) If STX's nil loss contention failed, a dispute arose as to the date by reference to which, as a matter of legal principle, TT's losses should be assessed. I shall refer to this as "the exercised options damages assessment date principle". TT contended in this regard that its damages should be assessed by reference to the market price for shipbuilding contracts for vessels similar to the April option 1 vessels and April option 2 vessels at, or shortly after, the date of termination of the option agreement. If that contention is right, then TT and STX are agreed as to the amount of damages payable in respect of the loss of STX's bargain to enter into the April option 1 SBCs and the April option 2 SBCs.

(3) STX, however, contends for an exercised options damages assessment date principle under which TT's damages should be assessed using a different approach. What is said by STX is that the court should assess the market value of the April option 1 vessels and the April option 2 vessels at the time or times when they ought to have been delivered. The damages to be awarded would then be computed by deducting, for each vessel, the price to be paid along with $390,000 for saved supervision costs. This approach might, in theory at least, require the identification of a series of dates on which the April option 1 vessels and April option 2 vessels ought to have been delivered. STX said that

this approach would be in accordance with section 51(3) of the Sale of Goods Act 1979.

(4) TT and STX were unable to agree on the relevant delivery dates. Nor were they able to agree on the relevant market values. Accordingly, if STX's approach to the exercised options damages assessment date issue is correct, the parties submit that the court should decide when the vessels ought to have been delivered, and resolve issues between the expert witnesses as to market values.

262. At the time of CDG's February letter, April option 3 had not been exercised. Indeed under the option agreement it could not be exercised any earlier than 6 April 2014. TT said that if the option agreement had not been terminated then it would have exercised April option 3 in respect of all four permitted vessels. STX denied that TT would have done so. In this context I shall use the terms:

(1) "April option 3 potential vessel" to refer to a vessel in respect of which April option 3 might have been exercised if the option agreement had not been terminated;

(2) "April option 3 actual vessel" to refer to a vessel in respect of which, for the purposes of assessment of damages, the court concludes that TT would have exercised April option 3;

(3) "April option 3 potential SBC" to refer to the potential SBC for an April option 3 potential vessel; and

(4) "April option 3 actual SBC" to refer to the SBC for an April option 3 actual vessel.

263. If it were held that TT would have exercised April option 3 in relation to one or more vessels, then in that regard STX relied upon the nil loss contention. If that contention failed then here, too, there was a dispute as to the legal principle governing the appropriate assessment date ("the April option 3 damages assessment date principle"). If STX were right to contend that in principle the date should be when the April option 3 actual vessels ought to have been delivered, then there was a dispute as to what, as regards each such vessel, that date would have been. In addition, whatever the assessment date, there were disputes as to the appropriate market values and the parties submitted that I should resolve issues between the expert witnesses in this regard.

264. The parties' submissions on STX's nil loss contention are examined in section E2 below. In section E3 below I discuss the parties' contentions on the exercised options damages assessment date principle and on the April option 3 assessment date. Section E4 below considers quantification questions concerning loss of STX's bargain as to April options 1 and 2. In this regard section E4.1 discusses the damages payable if TT is right to say that damages should be assessed by considering the position on or shortly after the date when the option agreement was terminated. Section E4.2 discusses the damages payable if STX is right to say that damages should be assessed by considering what the position would have been at the delivery date of relevant vessels. In section E5 below I turn to TT's claim for damages in relation to loss of

STX's bargain concerning the April option 3 potential vessels, and examine the question whether, if STX had not renounced the option agreement, TT would have exercised April option 3 in relation to one or more vessels. Assessment of damages in relation to TT's claim concerning April option 3 is then dealt with in section E6. In that regard section E6.1 discusses the damages payable if TT is right to say that damages should be assessed by reference to the position at the time that the options would have been exercised. Section E6.2 discusses the damages payable if STX is right to say that damages should be assessed by reference to the position at the dates when the vessels in question would have been delivered. In section E7 below I summarise my conclusion on the quantum of damages that would have been payable if TT had succeeded on liability.

E2. STX's nil loss contention

E2.1 STX's nil loss contention: introduction

265. STX's nil loss contention was set out in paragraph 30.c.ii. of STX's defence. Paragraph 30.a. admitted the content of CDG's February letter, including the purported notice terminating the option agreement. Paragraph 30.b. denied that the notice of termination was valid. Paragraph 30.c. began by denying that, even if TT's termination of the option agreement was valid, there was any entitlement to compensation for loss of bargain. In support of this denial, three subparagraphs were relied upon. Subparagraphs i. and iii. relied upon STX's allegations as to what had taken place when the firm SBCs and the option agreement were signed on 4 April 2014. They have now been deleted by amendment. Thus the only remaining basis for denying TT's entitlement to compensation for loss of bargain is paragraph 30.c.ii. I set it out below with the insertion for ease of reference of sentence numbers in square brackets:

> [1] In any event, the terms of the shipbuilding contracts entered into under the Option Agreements would have included terms in similar terms to Articles 10(h), 10(j), 11(g) and 11(h) set out above.
>
> [2] In the premises, the recoverable damages are zero, in circumstances where no instalment was ever actually paid.
>
> [3] In the event of Teekay exercising its right to rescind under Article 11(f)(vi), the Claimant's remedies would have been, and would only have been, as set out in Articles 10(j) and 11(h) of the Shipbuilding Contracts, pursuant to which, subject to refund of any sums paid by Teekay and the purchase cost of any Buyer's supplies, all obligations, duties and liabilities of both parties were "completely discharged".
>
> [4] It is obvious that this is inconsistent with any right of Teekay to claim additional compensation and/or with the same circumstances giving rise to a repudiation allowing Teekay to claim damages at common law; the existence of such a right

would be commercially nonsensical given the terms of Article 11(h).

266. It is apparent that the contractual provisions cited in paragraph 30.c.ii. concern what sentence [1] describes generally as "the shipbuilding contracts entered into under" the option agreement. I shall refer generally to these contracts as "the notional SBCs".

267. As to sentence [1], it was rightly admitted by TT in paragraph 12(2) of its reply that the notional SBCs would have contained the provisions cited by STX.

268. It is convenient at this stage to put sentence [2] on one side, and to turn to sentences [3] and [4]. Both these sentences appear to be concerned only with the rights of TT on the implicit assumption that TT would be the buyer under the notional SBCs. Paragraph 12(2) of TT's reply appears to proceed on the same assumption. I observe here that the assumption is highly unlikely to be correct. STX's own submissions drew attention to the fact that the firm SBCs were contracts made between STX as builder and individual subsidiaries of TT as buyer, and asserted rightly that the same would have been the position in relation to the notional SBCs. Moreover, even if an actual SBC was initially entered into by TT, article 14(a) made provision for assignment of benefits by the buyer, while article 14(c) gave the buyer the right to novate the SBC to a third party subject to the prior written consent of the builder, such consent not to be unreasonably withheld.

269. Article 11 concerned default by the buyer and builder. Sentence [3] of paragraph 30.c.ii of the defence referred to TT exercising its right to rescind under article 11(f)(vi). That right arose where there had been a failure by the builder to furnish the buyer with the refund guarantee in article 10(k) within thirty days after effectiveness of the notional SBC.

270. Sentence [3] also made reference to articles 10(j) and 11(h). In order to understand that reference, it is necessary to summarise how article 10 dealt with contractual rejection of a vessel and contractual cancellation, and how article 11 dealt with contractual rescission.

271. Article 10 was concerned with payment. In that regard:

(1) Payment prior to delivery was dealt with in article 10(h). It applied if the vessel were rejected by the buyer pursuant to, or the notional SBC were cancelled by the buyer in accordance with, "the terms of this Contract". In that event article 10(h) stated that the builder "shall forthwith refund" the full amount of sums paid by the buyer to the builder prior to delivery of the vessel unless the builder disputed the buyer's rejection/ cancellation or the builder proceeded to arbitration. It also set out provisions as to interest and charges which are irrelevant for present purposes.

(2) Return of the buyer's supplies was dealt with in article 10(i). It applied if, pursuant to the provisions of the notional SBC, the builder was required to refund to the buyer the instalments paid by the buyer to the builder. In that event article 10(i) required that the builder "shall return" all the buyer's supplies not incorporated into the vessel and pay to the buyer of an amount equal to the cost to the buyer of supplies incorporated into the vessel.

272. As noted earlier, article 11 was concerned with default by the buyer and the builder. Article 11(g) was headed "Refund by Builder". It comprised three paragraphs:

(1) The first paragraph applied in the event that the buyer exercised "its right of rescission of this Contract under and pursuant to any of the provisions of this Contract specifically permitting the buyer to do so". In that event the first paragraph of article 11(g) provided that the builder "shall … promptly refund" the full amount of sums paid by the buyer to the builder on account of the vessel, unless the builder proceeded to arbitration.

(2) The second paragraph dealt with interest, and is irrelevant for present purposes.

(3) The third paragraph stated:

> If the Builder is required to refund instalments, the Builder shall also be required to pay to the Buyer the purchase cost of the buyer's supplies. All costs and expenses in issuing and maintaining the Refund Guarantee shall be for the account of the Builder.

273. Thus in the event of contractual rejection of the vessel or cancellation of the notional SBC, article 10(h) gives to the buyer a remedy of refund, and article 10(i) gives a further remedy enhancing the remedy of refund, by making additional provision concerning buyer's supplies. Further, in the event of contractual rescission by the buyer the first paragraph of article 11(g) entitles the buyer to a remedy of refund, and the third paragraph of article 11(g) gives a further remedy, enhancing the remedy of refund, by requiring the builder to pay the purchase cost of the buyer's supplies. I shall refer to the remedies available to the buyer under article 10(h) and (i) together as "the article 10 enhanced refund". I shall refer to the remedies available to the buyer under the first and third paragraphs of article 11(g) together as "the article 11 enhanced refund".

274. Returning to articles 10(j) and 11(h):

(1) Article 10(j) stated that the article 10 enhanced refund "shall forthwith discharge all the obligations, duties and liabilities of each of the parties hereto to the other except the claims the Builder has against the Buyer, if any, under this contract…";

(2) Article 11(h) stated that upon "such refund", presumably referring to the article 11 enhanced refund, all obligations, duties and liabilities of both parties were "completely discharged".

275. Sentence [3] of paragraph 30.c.ii. said that in the event of rescission by TT under article 11(f)(vi) TT's remedies would have been, and would only have been, the article 10 enhanced refund and the article 11 enhanced refund. For my part, as regards rescission by TT under article 11(f)(vi), while this would lock into the provisions for the article 11 enhanced refund, I find it difficult to see how the provisions concerning the article 10 enhanced refund would be engaged. TT, in this regard, simply noted in paragraph 12(2)(b) of its reply that the buyer was expressly granted certain (limited)

contractual remedies upon the occurrence of particular events. It added that the events in question would include events which would not be a breach of the notional SBC.

276. Sentence [4] of paragraph 30.c.ii. said, in effect, that article 11(h) precluded:

(1) any right of TT to claim additional compensation; and/or

(2) the same circumstances giving rise to a repudiation allowing TT to claim damages at common law.

277. As to this, TT said at paragraph 12(2)(a) of its reply that if STX failed or evidenced unwillingness to provide refund guarantees under the notional SBCs, and thereby evidenced its inability or unwillingness to perform the notional SBCs, STX would have been in repudiatory/ anticipatory breach of the notional SBCs, with the consequence that TT could (and would) have terminated them at common law and claimed damages at large. Paragraph 12(2)(b) of the reply added that the contractual right to terminate the notional SBCs under articles 10 and 11 was not expressed to exclude (and on its true construction did not exclude) the buyer's right to terminate the SBCs at common law or any of the buyer's remedies in the event of a termination at common law. In this regard TT submitted that articles 10(j) and 11(h) set out consequences only where a refund was made because the buyer had taken steps which led to articles 10(h) or 11(g) being applicable. The grant of those limited remedies did not, said TT, exclude the buyer's ordinary rights to terminate at common law in respect of a repudiatory breach of the builder's obligations under the notional SBC.

278. Returning to sentence [2] of paragraph 30.c.ii, it contained no explanation of why "the premises" had the consequence suggested in that sentence. In that regard, paragraph 121 of TT's skeleton argument advanced TT's analysis of what it understood STX to be saying:

> 121. Although not set out in the ADCC, the logic of STX's argument appears to be that: (1) had Teekay and STX entered into the shipbuilding contracts for the Optional Vessels, STX would have failed to perform its obligation to provide refund guarantees, (2) Teekay would therefore have terminated the shipbuilding contracts as a result of that failure and (3) in those circumstances, Teekay's remedy for STX's non-performance of the shipbuilding contracts would have been limited to recovering any instalments paid (which would have been nil).

279. In the light of this analysis TT's skeleton argument advanced an additional objection to STX's nil loss contention. I shall refer to it as "the assumed full performance objection". The assumed full performance objection asserted that STX's argument, as analysed by TT, was not open to STX. In this regard, in broad terms, the assumed full performance objection said that, on TT's analysis STX's argument involved STX asserting that it would have failed to provide refund guarantees, whereas:

(1) this would have been in breach of article 10(k) of each notional SBC; and

(2) because, in assessing damages, it is to be assumed in the counterfactual scenario that the contract-breaker would have performed its obligations in full.

280. STX's skeleton argument in response modified and added to paragraph 30.c.ii. of its defence. The modification was that it no longer relied on the article 10 enhanced refund as precluding entitlement to seek compensation or claim that there had been repudiation. The skeleton argument clarified that STX's nil loss contention relied upon article 11, and that article 10 was relied upon only as an example of a provision which specifically saved certain contractual rights. This reflected what had been said in sentence [4] of paragraph 30.c.ii. of STX's defence. I shall refer to it as "the enhanced refund sole remedy proposition".

281. The addition sought to respond to TT's assumed full performance objection. In that regard STX relied upon two further propositions:

(1) I shall refer to the first as "the no RG obligation proposition". The no RG obligation proposition asserted that the provision of refund guarantees was not a contractual obligation upon the builder under the notional SBCs.

(2) I shall refer to the second proposition as "the what would actually happen proposition". It asserted that if the party in breach would have also breached the contract in an additional way such as to minimize damages, that factual conclusion must be applied: otherwise the injured party would be over-compensated for the breach complained of.

282. The additional issues which had emerged in the skeleton arguments did not feature in the original list of issues prepared for the trial. In order to ensure that all issues were identified, I asked the parties to prepare a revised agreed list of issues. As drafted by the parties, it set out the issues on STX's nil loss contention in two stages.

283. The first stage was set out in revised agreed issue 3.1 as follows:

> 3.1 Are damages to be assessed on the assumption, in the counterfactual scenario, that STX would have complied with its contractual obligations, including under the shipbuilding contracts to be concluded pursuant to the Option Agreement? If so, would those shipbuilding contracts have imposed a contractual obligation on STX to provide refund guarantees?

284. Issue 3.1 thus proposed two questions. The first concerned whether TT could rely upon the assumed full performance objection in relation to contractual obligations placed on STX, including those under the notional SBCs. The second concerned whether TT could refute the no RG obligation proposition. If the answer to both those questions were "yes", then STX's nil loss contention would fail.

285. Revised agreed issue 3.2 was:

> 3.2 If the answer to issue 3.1 is "no" and damages are to be assessed on the basis of what would actually have happened in the counterfactual scenario (even if that would involve a breach of contract), then has the Claimant suffered no loss because it would not in fact have received the benefit either of performance of the shipbuilding contracts or of the right to claim damages at common law for loss of bargain? In that

> regard, are the provisions of the shipbuilding contracts that should have been agreed pursuant to the Option Agreement (including, in particular, Articles 10(h), 10(j), 11(g) and 11(h) of the shipbuilding contracts) such that if the Defendant had failed to provide a refund guarantee and the Claimant had exercised a right to terminate those shipbuilding contracts, the Claimant's sole remedy would have been a refund of any sums paid under Articles 10(j) and 11(h); that is, would the right to terminate at common law and to claim loss of bargain damages have been excluded?

286. The two questions identified in revised agreed issue 3.2, in effect, asked whether STX's enhanced refund sole remedy proposition was correct.

287. As argument progressed, I raised with counsel a query whether STX's nil loss contention overlooked an important distinction. This is that, upon exercise of any of the options, the option agreement contained a bargain under which STX's obligation in respect of that option would be fulfilled by STX entering into the relevant notional SBC. The assumption that must be made for present purposes is that TT is entitled to seek damages because it has been deprived of the benefit of that bargain.

288. Underlying my query was a concern about sentence [2] of paragraph 30.c.ii. of STX's defence. That sentence began with a reference to the recoverable damages for loss of the bargain contained in the option agreement. It then jumped to a conclusion which turned on what happened during the course of performance of the SBCs contemplated by the option agreement. It was not clear to me that, in this respect, STX had grappled with basic questions. For present purposes I can formulate them in this way:

(1) In respect of April option 1 and April option 2, what sum by way of damages would compensate for loss of TT's entitlement to insist that, these options having been exercised, STX must enter into all four April option 1 SBCs and all four April option 2 SBCs?

(2) In respect of April option 3, what sum by way of damages would compensate for loss of TT's entitlement to exercise April option 3 and thereby be in a position to insist that STX must enter into one or more of the April option 3 SBCs?

289. In the discussion below I begin by considering STX's no RG obligation proposition in section E2.2. The enhanced refund sole remedy proposition is considered in section E2.3. In section E2.4 I comment on TT's assumed full performance objection. Section E2.5 summarises my conclusions.

E2.2 The no RG obligation proposition

290. STX's no RG obligation proposition is a proposition about the April option 1 and 2 SBCs, and about the April option 3 potential SBCs. When examining it at the present stage I put on one side the contentions advanced by STX in relation to the enhanced refund sole remedy proposition.

291. STX's argument relies on words in parenthesis in article 10(k) which I italicise below:

> As security for the refund of Instalments prior to delivery of the Vessel, the Builder shall *(as a condition of the Buyer's obligation to make payment of any of the Instalments of the Contract Price)* furnish the buyer with the letter of guarantee covering the amount of the instalments and any interest thereon...

292. There is no doubt that the notional SBC would give the buyer an entitlement to rescind the contract if the refund guarantee were not provided within thirty banking days after the notional SBC had become effective: see article 11(f)(vi). The words in brackets in article 10(k) are entirely consistent with that entitlement. If the buyer were to rescind the contract in reliance upon article 11(f)(vi), then it would follow that the buyer's remedies would be restricted: see section E2.3 below.

293. If the words in brackets had not been present in article 10(k), there could be no doubt that article 10(k) imposed an express obligation to provide a refund guarantee. It is common ground that the word "shall", which appears prior to the words in brackets, is mandatory and imposes a requirement. STX's suggestion, however, is that because the word "shall" is found immediately before the words in brackets, and because article 10(k) contains no express time limit, the requirement imposed by the word "shall" is only a requirement if STX wants to receive an instalment of the price.

294. I am not persuaded by this suggestion. The whole structure of the SBC proceeds on the footing that the parties have agreed for work to progress as payments are made. The timing of payments is dealt with in article 10(b). A first instalment of 10% of the price is due five banking days from receipt by the buyer of the refund guarantee. The second instalment of 10% is due within three banking days after receipt of certification that steel cutting of the vessel has commenced, but in any event not earlier than 365 days after the due date of the first instalment. The third instalment of 10% of the price is due within three banking days of certification that the vessel's keel has been laid. The final instalment of 70% of the price, subject to adjustment in accordance with the SBC, is due and payable on delivery of the vessel. The SBC plainly contemplates that work will proceed in stages in accordance with these provisions. It would be astonishing if STX had no obligation to provide the refund guarantee, this being the pre-requisite which enables work to proceed in accordance with the stages contemplated by the contract.

295. STX sought to answer this by saying that it would still be under an obligation to build and deliver the relevant vessel within the contractual timescale. Those obligations, submitted STX, would "exist and persist irrespective of the provision by the builder of a refund guarantee."

296. There are two difficulties with this suggested answer. The first is that the SBC simply does not provide for payment of the price independently of the instalments. As regards all instalments, article 10(k), it is common ground, has the consequence that no instalment need be paid during the period prior to provision of the refund guarantee. Moreover, on the face of article 10(b) the first instalment will not be due for payment until five banking days after the buyer has received the refund guarantee, and the second instalment will not be due and payable until 365 days after the due

date of the first instalment. What is payable on delivery is the final instalment, not the entire price.

297. The second difficulty is that it deprives article 11(f)(vi) of its commercial purpose. If STX's obligation to build and deliver the vessel within the contractual timescale persists irrespective of whether a refund guarantee has been provided, then it is difficult to see why a buyer could possibly wish to terminate the SBC merely because the refund guarantee had not been provided.

298. In these circumstances I have no doubt that the no RG obligation proposition reads too much into the insertion of the words in brackets in article 10(k). They do no more than emphasise that the buyer will be under no obligation to pay any instalment so long as the refund guarantee has not been furnished by STX. As to the absence of a time limit in article 10(k), applying the principles discussed in section C above, the court would have no difficulty in implying a term that the refund guarantee must be provided within a reasonable time. In that regard TT sought to rely upon the decision of Cooke J in *Wuhan Ocean Economic & Technical Cooperation Co Ltd v Schiffahrts-Gesellschaft "Hansa Murcia" MBH & Co KG* [2012] EWHC 3104 (Comm). I agree with STX that this decision is not directly relevant to the present case. Arbitrators in that case had held that an agreement by sellers to extend the validity of a refund guarantee carried with it an obligation to provide the extended guarantee within a reasonable time. The court upheld the arbitrators' award in that regard. The decision turns on the facts of the particular case, and is no more than an example of the willingness of the court to infer, where parties have agreed that there is an obligation to do something, that the thing in question must be done within a reasonable time.

299. I noted earlier that sentence [2] of paragraph 30.c.ii. contains no explanation of how it is that the terms of the notional SBC will have a bearing on the assessment of damages for breach of the option agreement. In oral closing submissions STX sought to reconcile the no RG obligation proposition with the fundamental principle described in section E1 above. It was said, in effect, that far from having lost a valuable bargain, TT had lost a bargain of no value. The reason was said to be that in relation to each relevant vessel, performance of the option agreement would simply result in STX signing an SBC which the buyer would terminate when STX failed to provide a refund guarantee. For the reasons given above, however:

(1) In my view the relevant SBC would have imposed an obligation on STX to provide a refund guarantee; moreover

(2) The eventual stance taken by STX in oral submissions was that irrespective of provision of a refund guarantee, the obligation to build and deliver the ship would "exist and persist", in which event it is difficult to see why a buyer would have any commercial motivation to terminate the contract merely because a refund guarantee had not been provided.

E2.3 The enhanced refund sole remedy proposition

300. Whether STX's enhanced refund sole remedy proposition is sound depends on the true meaning of the notional SBCs. For this purpose I must have regard to the words

used, and to the factual matrix. As regards both these features the notional SBCs are very different from the features found in other cases that were cited to me. In those circumstances I do not find it useful to analyse what was said in those other cases.

301. If a buyer were to rescind the relevant SBC under article 11(f)(vi) for failure to provide a refund guarantee within thirty banking days after the SBC took effect, then article 11(g) and (h) would come into operation. Under article 11(g) the builder must, unless it proceeds to arbitration, refund the full amount of all sums paid by the buyer to the builder on account of the vessel. Under that same provision the builder is to pay the buyer the cost of buyer's supplies. Under article 11(h), "such refund" will have the consequence that all obligations, duties and liabilities of each party to the other are "forthwith completely discharged." If the SBC had been rescinded by the buyer under article 11(f)(vi), then it seems to me there could be no doubt that upon payment of "such refund" the operation of article 11(h) would preclude an action for damages. To that extent the enhanced refund sole remedy proposition is sound.

302. In STX's closing submissions it was said that "the only sensible conclusion is that the parties did not intend to confer rights in the buyers to terminate on the basis of non-production of refund guarantees and claim damages." The reasoning appears to be that, on the footing that provision of a refund guarantee is no more than a condition precedent to payment of instalments, the parties' intention must have been to define and limit the buyer's rights arising if a refund guarantee was not provided within thirty business days: namely rescission under article 11(f)(vi), with the consequences set out in article 11(g) and article 11(h).

303. I cannot accept this reasoning. STX acknowledges that the terms of the SBCs reflect the known financial difficulties of STX at the time of contracting. They give the buyer a simple contractual right to cancel in the event that refund guarantees were not procured within thirty days. STX adds, and I agree, that this allows the buyer to extract itself quickly from the contract. STX also adds that the commercial consequence is that the buyer's exposure to market movements was very small – just thirty days. I agree that article 11(f)(vi) would enable the buyer to limit that exposure to a period of thirty days, if the buyer so wished. I cannot, however, identify any commercial justification for thinking that the parties' intention was to require the buyer to abandon the contract if a refund guarantee had not been provided within the thirty days. Even if the obligation upon STX in relation to provision of a refund guarantee were no more than a condition precedent to payment of instalments, there is no reason to infer from this that the buyer was intended to have no remedy in the event that STX renounced its performance obligations under the contract. No doubt, on the footing that provision of a refund guarantee was no more than a condition precedent to payment of instalments, it must follow that failure to provide a refund guarantee is not a "breach" and cannot therefore found termination for breach. That is a very different thing from saying that in circumstances where a refund guarantee has not been provided, actions or omissions which in fact constitute a breach, or which amount to renunciation of the contract, can give rise to no claim for damages.

E2.4 TT's assumed full performance objection

304. TT accepted that a defendant is entitled to have damages assessed on the basis that the defendant will perform the contract in the way which is the most beneficial to the defendant. It noted, however, that the method of performance adopted must always be one that the defendant may lawfully take within the four walls of the contract and still be performing it. I shall refer to this as "the lawful performance principle". TT submitted that it applied not only to performance of the option agreement by entering into an SBC, but also to performance of the SBC itself. Accordingly, submitted TT, if STX's no RG obligation proposition failed, then STX's nil loss contention was also bound to fail.

305. This contention by TT was disputed by STX on a number of grounds. In the present circumstances it is not necessary to determine whether TT is right or wrong in this respect. I have, for the reasons above, concluded that STX's arguments fail not only on STX's no RG obligation proposition but also on STX's enhanced refund sole remedy proposition. There is thus no basis for STX's nil loss contention, which relies upon one or other of these propositions to justify its assertion that the buyer under the eventual SBC would not be able to complain when STX, as in the circumstances assumed for present purposes, failed to provide a refund guarantee.

306. In my view it is not merely unnecessary, but also undesirable, to attempt to decide the ambit of the lawful performance principle in the present case. TT submitted that its contention necessarily followed from the established approach under which, when assessing what the innocent party would have earned had the contract been performed, the court must assume that the party in breach has performed its obligations. However, that principle, on its face, simply has the effect that when assessing damages in the present case the court must assume that STX would have performed its obligation under the option agreement to enter into the relevant SBC. TT asserts that the same approach must be adopted in relation to the SBC itself. It seeks to justify this by saying that this would be the result under the lawful performance principle if the transaction had been structured as a shipbuilding contract which the parties were only obliged to perform if TT exercised an option to that effect. The suggestion that TT, for that or any other reason, can rely upon an extension to the lawful performance principle is novel. It is best considered in a case where it will have a determinative effect on the outcome.

E2.5 STX's nil loss contention – conclusion

307. I am not persuaded that STX's nil loss contention succeeds. For the reasons given in section E2.2 above, the commercial logic of the notional SBCs necessarily entails that provision of refund guarantees is more than merely a condition precedent to payment. For the reasons given in section E2.3 above there is, in my view, no sound commercial reason for concluding that the article 11 enhanced refund would define the limit of remedies available to TT if circumstances arose where STX failed to provide refund guarantees. These conclusions make it unnecessary for me to determine whether TT's assumed full performance objection is correct, and I consider it undesirable to do so.

E3. Relevant dates for assessing damages

E3.1 The exercised options damages assessment date

308. April options 1 and 2 had both been exercised by the time of CDG's February letter. That being the case, TT submits that its loss of bargain damages in relation to these two options are to be assessed by identifying the market price for shipbuilding contracts similar to the April options 1 and 2 SBCs at, or shortly after, the date of termination of the option agreement. STX, by contrast, asserts that damages in relation to these vessels are properly assessed by applying section 51(3) of the Sale of Goods Act 1979 and identifying the market value of the relevant vessels as at the time or times when they ought to have been delivered.

309. TT submits that STX's contention is inconsistent with the fundamental principle identified in section E1 above. I have no doubt that TT's submission is correct. The contract that has not been performed is the option agreement. TT is entitled, so far as money can do it, to be placed in the same position as if the option agreement had been performed. In relation to the April option 1 and 2 vessels, the contract would have been performed by STX entering into the notional SBCs for those vessels. It follows that the damages payable to TT in this regard are to be computed by comparing the cost to TT of a replacement SBC with the cost to TT under the option agreement if STX had performed the option agreement. That cost does not involve immediate payment by TT of an additional sum. What it involves is an agreement on the part of TT, or such other party as it arranges to be the buyer, to pay in stages sums much greater than those that would have been payable at the same stages had the option agreement been performed.

310. STX's approach, by contrast, seeks to put TT in the position it would have been in if the SBCs had been performed. That would be the court's task if the SBCs had been made with TT, had been neither assigned nor novated, and had been terminated by TT after renunciation by STX. Embarking on that task is neither necessary nor appropriate in circumstances where STX had renounced the option agreement, and at the time of termination for renunciation the cost of a suitable replacement bargain can be readily identified.

311. STX's oral closing submissions sought to answer this point in various ways. It pointed out that before the SBC could be entered into, a delivery date would have to have been determined. That is true, but it remains the case that, on the assumption that must be made for present purposes, that a delivery date has been identified, the termination of the option agreement in February 2014 had the consequence that TT lost the benefit of its bargain for delivery of those vessels on those dates, and its rights in relation to the building of those vessels beforehand. The task of the court is to seek to identify, on or shortly after termination, what sum of money would put TT in a position enabling it to obtain the rights it has lost.

312. STX then suggested that what TT would have gained under the option agreement was a transfer of property in the relevant vessels against payment of the price, thereby engaging section 51(3) of the Sale of Goods Act 1979. STX acknowledged that on this approach it would be necessary to take account of principles concerning

mitigation of loss. It referred in this regard to observations in paragraph 17 of Lord Sumption's judgment in *Bunge SA v Nidera BV*:

> … Normally, however, the injured party will be required to mitigate his loss by going into the market for a substitute contract as soon as is reasonable after the original contract was terminated. Damages will then be assessed by reference to the price which he obtained. If he chooses not to do so, damages will generally be assessed by reference to the market price at the time when he should have done: *Koch Marine Inc v d'Amica Societa di Navigazione (The Elena D'Amico)* [1980] 1 Ll Rep 75 , 87, 89. The result is that in practice where there is a renunciation and an available market, the relevant market price for the purposes of assessing damages will generally be determined not by the prima facie measure but by the principles of mitigation.

313. As to that, I am willing to assume for present purposes only, that the buyer under the SBC, in the event that STX failed to deliver the vessel, would be entitled to damages in accordance with section 51(3). But TT's complaint under the option agreement is not that there has been a failure to transfer property. TT's complaint is that it has lost the benefit of a bargain under which STX would deliver a signed SBC. That obligation was immediate: indeed it was long overdue. An inquiry into how much it would cost to obtain a replacement SBC was not an inquiry as to mitigation of loss: it was an inquiry into the cost of putting TT into the position it would have been in if relevant parts of the option agreement had been performed.

314. STX's final contention in this regard was that TT's claim was not a claim for the value of the options. They sought, observed STX, damages on the basis of a difference between market and contract price. I agree that in relation to the April options 1 and 2 vessels TT's claim is not a claim for the value of the options. The options have already been exercised. TT's claim is that it is entitled to be put in a position it would have been if STX had performed the option agreement in this regard by entering into SBCs. True it is that the price under the SBCs would only become payable in full upon delivery of the relevant vessels. As of February 2014, however, TT was put in a position where it would be necessary to promise to pay a much greater price than would have been the case if STX had performed the option agreement.

315. I note in section E4.1 below that a question might arise as to whether when computing the loss to TT allowance should be made for the fact that the terms of the both the notional SBCs and the replacement SBCs will provide for payment of the price over a period of time. Subject to that aspect, I conclude that the relevant date in relation to April options 1 and 2 is on or shortly after 6 February 2014. It is at that date that the court must assess the cost of putting TT into the position that it would have been in if STX had entered into SBCs for the April option 1 and 2 vessels.

E3.2 Relevant dates for April option 3

316. Under the terms of the option agreement, April option 3 could not be exercised earlier than 6 April 2014 or later that 5 October 2014. Thus at the time of termination in February 2014 exercise of April option 3 was something for the future.

317. TT accepted that loss of bargain damages in relation to April option 3 would only be recoverable if TT proved that it would have exercised that option in relation to one or more vessels. As explained below, on the first day of the trial I queried whether TT did indeed need to prove this. For reasons which will become apparent, TT did not seek to resile from the concession that it had made. The question whether TT would indeed have exercised April option 3 is dealt with in section E5 below.

318. For present purposes the question is how, assuming that TT can if necessary show that it would have exercised April option 3 in respect of one or more vessels, loss of bargain damages should be computed where the bargain that has been lost is an entitlement to exercise an option in the future. The parties gave consideration to that question when preparing the revised agreed list of issues. Revised agreed issue 3.4.1 identified three ways in which damages might be assessed in relation to TT's loss of the ability to exercise April option 3. The first was set out in subparagraph (a):

> (a) the market value of the April option 3 vessels as at the time or times when they ought to have been delivered in accordance with section 51(3) of the Sale of Goods Act;

319. Subparagraph (a) thus sets out the same proposed method of assessment as that which had been proposed by STX in relation to April options 1 and 2. For reasons given in section E3.1 above I have concluded that this is not an appropriate method of assessment for April options 1 and 2. It was not suggested by STX that if I reached that conclusion on April options 1 and 2, the position might be any different in relation to April option 3. I consider that the same reasoning applies in relation to April option 3, and accordingly the method proposed in subparagraph (a) is not an appropriate method of assessing TT's loss of bargain damages in relation to April option 3.

320. The method proposed in subparagraph (b) of revised agreed issue 3.4.1 was:

> (b) the market price for shipbuilding contracts for vessels similar to the April option 3 vessels as at the date on which the third option could have been exercised (*i.e.* 6 April to 5 October 2014);

321. Subparagraph (b) of revised agreed issue 3.4.1 was a modified version of the approach proposed by TT in relation to April options 1 and 2. The modification made by TT for this purpose was that the court should not, as I have done in relation to April options 1 and 2, seek to identify the market price for shipbuilding contracts for similar vessels at the date of termination of the option agreement. Instead, the court should look to the date on which April option 3 could have been exercised. As indicated earlier, the period during which it could have been exercised was 6 April to 5 October 2014 inclusive.

322. Subparagraph (c) was the subject of a footnote. Accordingly, below I set out subparagraph (c) along with the footnote, which I have put in square brackets.

> (c) the value of the third option at the date of termination of the option agreement?[fn1: This issue is not raised by the parties' statements of case and the parties reserve the right to make submissions as to the consequences of that fact.]

323. Subparagraph (c) of revised agreed issue 3.4.1 arises from my intervention on the first day of the trial. As noted above, I queried whether it was necessary for TT to prove that it would have exercised April option 3. My query arose because, when the option agreement was terminated on 6 February 2014, TT lost the benefit of its bargain as regards the right to exercise April option 3 in future. Applying the fundamental principle identified in section 3.1 above, the task for the court would be, so far as money can do it, to put TT in the position it would have been if, on or shortly after 6 February 2014, it were the beneficiary of an option entitling it, during the period 6 April to 5 October 2014, to enter into contracts which as closely as possible resembled the April option 3 potential SBCs. This might, as it seemed to me, mean that it would be unnecessary for the court to consider whether that option would in fact have been exercised. Accordingly I questioned whether the task for the experts should have been to value the contractual entitlement to exercise April option 3 in a future window. The reply from TT was that the best that the experts could do was to give the market value of the vessels, which in turn gave the value of April option 3.

324. My question echoed what had been said in paragraph 170 of TT's skeleton argument. In paragraph 170 TT was concerned to rebut STX's proposed approach. In that regard TT had made a general observation that the right which TT enjoyed in February 2014 to purchase vessels at a fixed price for future delivery were themselves "marketable and of significant value". However, it was plain from the preceding paragraph that TT had anticipated my question and had identified an answer to it. Footnote 83, at the end of paragraph 169(2) of TT's skeleton argument, noted that in theory it might be possible to envisage TT entering into a contract, within a reasonable period after 6 February 2014, providing it with options exercisable between 6 April and 5 October 2014. That, however, was said by TT to appear commercially unrealistic, given that the option would be under negotiation almost immediately before that period began. What was said in order to justify TT's approach, as eventually set out in revised agreed issue 3.4.1 (b), was explained in paragraph 169(2):

> (2) The assessment of loss in respect of the third option should be undertaken by reference to a replacement contract, concluded between 6 April and 5 October 2014, for delivery of newbuilding vessels in 2017. This is the closest approximation to what Teekay lost by virtue of STX's renunciation and/or repudiation because Teekay was only required to decide between 6 April and 5 October 2014 whether to commit itself to the Third Optional Vessels and, therefore, the replacement should be assessed on the basis that Teekay would have gone into the market for a replacement at the same time.

325. The expert reports made no mention of any possibility of TT entering into a contract within a reasonable period after 6 February 2014 providing it with an option

exercisable between 6 April and 5 October 2014. In the course of the oral evidence of the experts neither side asked the experts to consider whether this would have been commercially feasible. In oral closing submissions TT put its case on the basis that April option 3 would have translated into four further SBCs at the specific price set out in the option agreement. Later in oral submissions, by reference to a written note regarding issues of quantum, TT contended that, especially given the short period between renunciation on 6 February 2014 and the start of the strike period on 6 April 2014, it was most realistic to value TT's rights under April option 3 by reference to the price at which TT could have entered into shipbuilding contracts during the option strike period. In STX's oral closing submissions, and in STX's closing notes, there was no suggestion that it would have been commercially feasible for TT to have entered into a contract, within a reasonable period after 6 February 2014, providing it with options exercisable between 6 April and 5 October 2014. In those circumstances I am satisfied that TT is right to contend that the method of assessment it proposes, as set out in subparagraph (b) of revised agreed issue 3.4.1, represents the closest approximation of what can be done to put TT, so far as money can do it, in the same position as it would have been if it had continued to enjoy the benefit of April option 3. I am also satisfied that TT's approach gives a commercially realistic assessment in this regard.

326. In these circumstances it is not necessary to deal with observations by the parties in closing submissions on how the court should proceed if it were appropriate to seek to identify the cost to TT of entering into a contract within a reasonable period after 6 February 2014 providing it with options exercisable between 6 April and 5 October 2014. I think it desirable, however, to make brief comments on two suggestions advanced in STX's written closing notes. The first is a suggestion that a conclusion that the value of April option 3 at termination was the correct measure would have the consequence that TT had failed to prove any loss. In circumstances where STX's statements of case had not sought to advance any contention other than assessment of the value of relevant vessels on the date of delivery, this would be a very unsatisfactory course. I would have no hesitation in preferring the alternative course proposed by TT of making the best assessment possible on the evidence, even if less than perfect. The second was a suggestion by STX that if the court were to assess the value of the option as best it can, it would be bound to consider the option to be of very low value. This contention was said to be justified by the risks involved in taking an option from a party carrying on business under a VBNP, in known market circumstances imposing pressure upon performance, and where there were actual and potential disputes surrounding the option agreement. I question whether this approach would be consistent with the fundamental principle identified in section E1 above. In any event, it does not appear to me to be an approach open to STX where it has failed to plead or prove that any of the matters in question would affect the value of April option 3.

E4. Quantification: April options 1 & 2

E4.1 April option 1 & 2: assessment at termination date

327. I have held in section E3.1 above that, as regards April options 1 and 2 damages are to be assessed by considering the position on or shortly after 6 February 2014. The

parties agree that the market price for substitute SBCs as at 6 February 2014 was US$53m. They also agree that credit must be given for a saving in supervision cost of US$390,000 per vessel. It is therefore agreed that TT's recoverable loss is US$40,440,000 in respect of the four April option 1 vessels and US$38,440,000 in respect of the four April option 2 vessels. The total is thus US$78,880,000 in respect of all eight vessels.

328. I noted in section E3.1 above that a question might arise as to whether, when computing the loss to TT, allowance should be made for the fact that the terms of the relevant SBCs will provide for payment of the price over a period of time. Under the firm SBCs payment is to be made in stages. The same would have been true under the April option 1 SBCs and the April option 2 SBCs, had they been entered into by STX. It would, as I understand it, also have been true of the replacement SBCs envisaged by the experts.

329. The position on termination was thus that what TT would have to pay overall for each April option 1 vessel and each April option 2 vessel would be $53m, but this sum would be payable in stages. Within five banking days after the relevant SBC became effective, 10% of the price (comprising the first instalment) would have been payable. The second and third instalments, each of 10%, would have been payable at the start of steel cutting and on laying the keel. The remaining 70% (comprising the final instalment) would be due upon delivery.

330. If the whole of the difference in net cost were treated as having been payable in February 2014, by way of damages, it seems to me that this would put TT in a better position than if the option agreement had been performed. None of this now matters, as I have found against TT on liability. Had I found in TT's favour on liability, I would have invited submissions on this aspect.

E4.2 April options 1 & 2: assessment at delivery date

331. My conclusion in section E3.1 has the consequence that even if TT had succeeded on liability, it would have been unnecessary to determine what the cost of replacement vessels would have been on relevant delivery dates. If I am wrong, and it is necessary to determine this, then TT relies on the evidence of Mr Willis to assert that the likely resale values of relevant vessels in 2016 and 2017 will be around $55m per vessel. STX, relying on the evidence of Dr Kent, asserts that the likely resale values in 2016 would be within a range of $51.4m to $53.2m, those in 2017 would be in a range between $48.3m to $50.5m, while the value in 2018 would be $44.1m.

332. Had this question arisen, the starting point would have been to identify relevant delivery dates. I would thus have to perform the task which, for reasons given in section C above, I consider to be too uncertain to be capable of performance. For present purposes I shall, subject to a concern identified in the next paragraph, simply make findings as to values in 2016, in 2017, and in 2018.

333. The present judgment is being delivered in February 2017. The delay has arisen as a result of illness on my part. I have a concern that predictions in April 2016 as to values later in 2016 and at the start of 2017 may well have been overtaken by events. In that regard, if I had found in favour of TT on liability, I would have been minded to

invite submissions on whether it would be appropriate to ask the experts for a joint note on market developments.

334. Differing terminology was used by the expert witnesses. The question which arises for present purposes concerns the price at which a newly built vessel similar to the April option 1 and 2 vessels could be purchased. The time that is under consideration is purchase of such a vessel upon delivery at a shipyard similar to STX and on dates which correspond to delivery dates for the April option 1 and 2 vessels. Mr Willis used the word "resale" for this purpose. Dr Kent used the term "0 year resale", in order to distinguish it from second hand sales of vessels which were much older, their age being identified by referring to them as, for example, a 5 year resale. I shall use the term "newly built resale" for this purpose.

335. TT identified an initial reason why the court should reject the evidence of Dr Kent. Dr Kent is a director and shareholder of Maritime Strategies International Limited ("MSI"). MSI is a specialist shipping consultancy established in 1995. TT says that figures used by Dr Kent, as opposed to general statements about market conditions, derive from MSI's proprietary models, and that these models have not been disclosed to Mr Willis.

336. TT submits that there are "obvious difficulties" with an approach under which the outputs of MSI's models are simply transposed into Dr Kent's reports. By way of example, TT notes that in Kent 1 Dr Kent's predicted resale values in 2016 were $54.9m to $58.6m, in 2017 $51.8m to $54.0m and in 2018 $44.8m. Dr Kent's revised values, set out earlier in the present section of this judgment, differ significantly from those earlier values. The explanation given by Dr Kent in paragraph 68 Kent 2 was as follows:

> 68. Further to paragraph 31 above, my view on the valuation of 113,000 Dwt crude/product ready tankers at delivery during 2016, 2017 and 2018 (paras 21.0.1 and 23.0.1 AK EWR) was formed on the basis of MSI's Q3 2015 TSPS model and report. Subsequent to the submission of AK EWR in November 2015 MSI has published (on the 3 December 2015) a Q4 2015 update to the TSPS model and report. Consequently, my view as to the value of 113,000 Dwt crude/product ready tanker, ordered en bloc at a second tier Korean shipyard, comparable to STX O&S, during 2016, 2017 and 2018 has been revised down. My current opinion, based on the latest data and information, is that the vessels' valuation would be [the values set out earlier in the present section of this judgment]

337. Dr Kent and MSI have declined requests to allow Mr Willis to have access to the models referred to in Dr Kent's reports. The justification for refusing to provide such access is said to be commercial confidentiality. The courts, however, have frequently devised mechanisms enabling the disclosure of commercially sensitive information so that the basis for an expression of expert opinion can be tested. For my part, I would be inclined to regard the failure to provide this information as of itself justifying the striking out of passages in Dr Kent's reports which rely upon it. TT did not seek such a draconian course.

338. Nonetheless the point remains that it is difficult for the court to assess the reliability of Dr Kent's evidence without knowledge as to the workings of the MSI models. STX's closing submissions referred to STX's written closing notes, in which it was asserted that Dr Kent's evidence was supported by a rigorous scientific framework, publically explained. There is no suggestion, however, that the public explanation involves disclosure of the internal workings of the MSI models. Dr Kent added in re-examination that TT in effect knew what MSI did in its models as MSI had regular dialogue with TT's head of research. Dr Kent also said that an explanation of the methodology was publically available. He did not, however, deny that neither TT not Mr Willis had had access to the actual underlying formulae in the models.

339. TT gave two examples where assumptions forming part of MSI's formulae appeared to have been seriously wrong. Moreover, submitted TT, in each of these two examples Dr Kent had failed to inform the court of important information relevant to the assumption in question.

340. The first such "assumption" was a prediction in paragraph 19.2.9 of Kent 1 that there would be a 6.1% increase in tanker fleet growth during 2016. Willis 2, at paragraphs 38 to 42 had questioned this high level of growth, preferring a rival estimate of 4%. In cross-examination Dr Kent was asked about his figures for tanker fleet growth. He immediately stated that figures he had supplied for tanker fleet growth, including the figure of 6.1% for 2016, represented "the position when I submitted my first supplemental report". Dr Kent's first supplemental report was Kent 2, dated December 2015. Dr Kent then said that the "latest numbers" had been based on the first quarter "MSI TSPS model" in which fleet growth for 2016 was "nearer 4.5%".

341. By the time he gave evidence, Dr Kent had produced a second supplemental report, Kent 3, dated 5 April 2016. He accepted that he had not referred in his reports to the change from the figure of 6.1%. When asked why he had not done so he replied that this was because:

> … I wasn't laying out every single assumption that goes into the MSI model.

342. After further questions Dr Kent accepted that "perhaps" he should have included the change in his supplemental report. STX submitted that criticism of Dr Kent in that regard was not fair, as the change in movement "had been fed into and applied by the model". This misses the point. So does the further suggestion by STX that Dr Kent had been entitled to regard the change as "marginal". This was a change which suggested that the assumptions in MSI's models were not as robust as MSI would wish. The fact that there had been a change only emerged when Dr Kent was asked about it in cross-examination. I am left wondering what other changes there may have been that Dr Kent regarded as "marginal" and therefore did not reveal. At the very least, there has been a significant failure by Dr Kent to recognize and to fulfil the duties which he owes to the court as an expert. The grudging acceptance that "perhaps" this change should have been included in his supplemental report does little to give the court reassurance in this regard.

343. The second example of an unreliable "assumption" concerned paragraph 19.2.6 of Kent 1. Dr Kent there said that oil demand in 2015 had been boosted by a softening in oil prices, and added that further drops in oil prices were unlikely in 2016/2017.

Willis 2 took issue with this in paragraphs 50 to 58. What happened after Willis 2 was that oil prices fell from $50 to $55 per barrel in November 2015 to lows in early 2016 of under $30 per barrel. By the time of the trial the price had recovered to $43 per barrel, still well below the levels Dr Kent considered would be sustained in November 2015.

344. In cross examination Dr Kent acknowledged that in Kent 1 he had said that a fall in oil prices provides a demand stimulus and boost to the market, and that this included the tanker market. He also acknowledged that in November 2015 he had been expecting oil prices to stabilise and, if anything, perhaps go up. In that regard he commented:

> … I think it came down a little lower than we had expected.

345. What had happened in early 2016 was that the price of oil had plummeted. There was no mention of this in Kent 3. STX sought to deflect criticism by commenting that it is inevitable that some assumptions as to the future may be falsified by events, and adding that drops in oil price do not automatically drive tanker prices up. Again, these attempts to excuse Dr Kent miss the point. The court was entitled to expect, once what had been forecast in Kent 1 had been shown to be badly wrong, that the next report from Dr Kent would inform the court about what had happened. As to whether or not what had happened invalidated any of Dr Kent's earlier conclusions, this would be a matter for the court to consider, not a matter which Dr Kent could privately discount.

346. Here, too, it appears to me that there is cause for concern about Dr Kent's approach to his task. At best, as it seems to me, it can be said that he lost sight of his duties to the court as an expert. TT identified three other criticisms concerning what appeared, by inference, to be "adjustments made to the assumptions in the MSI model". TT said that these "adjustments", like the "assumptions" discussed above, appeared to be unduly pessimistic.

347. The first such "adjustment" was said to emerge from paragraph 25 of Kent 3. Dr Kent there said that "the outlook for 2016 global oil demand growth has deteriorated significantly". TT claimed that this was not supported by Dr Kent's own table 3, which showed that oil demand would continue to grow in 2016 albeit at a marginally reduced rate. I am not persuaded, however, that criticism of Dr Kent is appropriate in this regard. He pointed out in cross-examination that relevant organizations had, between December 2013 and March 2014, revised down their view of 2016 growth. They were still predicting positive growth but it had been revised down. Dr Kent, could, as it seems to me, legitimately hold the view that these downward revisions represented a significant deterioration in the outlook as regards 2016 global oil demand growth.

348. The second "adjustment" concerned passages in paragraphs 29 to 30 of Kent 3. Dr Kent there predicted increased "downside risk for tanker demand", referring to the then current output freeze as "likely to be broadened in 2016", and adding that production restrictions had become "a more likely prospect in 2017". These assertions by Dr Kent were said by TT to be overconfident. TT noted in this regard that Dr Kent accepted in cross-examination that he did not know whether there would indeed be a broadening of the output freeze. As to whether production restrictions were a more

likely prospect in 2017, Dr Kent referred to the views taken in other forecasts. As to this "adjustment" I do not consider that the views he has advanced in this regard merit the sort of criticisms which I have made in relation to the two "assumptions" mentioned earlier.

349. The third "adjustment" concerned chart 1 in Kent 3. In paragraph 21 of Kent 3 this chart was presented as showing Aframax time charter equivalent development in 2016. The source for the data in the chart was described as being "Baltic Exchange". The context for chart 1 was that paragraph 20 of Kent 3 asserted that Aframax spot earnings had exhibited a general downward trend in 2016, though some short term support had come back into the sector in March. Examples of that short term support were short term floating storage requirements and weather conditions in the US Gulf. By comparison, it was said that the Aframax one year time charter rate January 2016 monthly average was $29.4k per day, in February $28.4k per day and by the end of March had fallen to $25.8k per day. However, chart 1 did not obviously show a downward trend, for it indicated prices in the latter part of March which, following lower prices in late January and throughout February, had risen to not far below prices early in January 2016. When Dr Kent was cross-examined about this, it emerged that chart 1 was based on averages for four routes. It also emerged that on two routes the MSI forecast for spot rates in the second quarter of 2016 was that these would go up. It seems to me that the discussion in paragraphs 20 and 21 omitted information which should have been included, and that among the information which ought to have been included was the forecast by MSI itself that there would be continuing growth in spot earnings in the second quarter of 2016 on two of the four routes which had formed the basis for the depiction of the first quarter in chart 1.

350. TT's next group of criticisms concerned what Dr Kent said in Kent 3 about falling tanker resale values. Section 3 of Kent 3 gave a general overview suggesting that a combination of "developing market factors and drivers" had led to a general reduction in Aframax earnings and values from 1 January to 5 April 2016. Section 4 of Kent 3 was headed "Reported Sales". Within section 4 paragraph 4 noted that Aframax sales in the first quarter of 2016 had been "limited". It also noted that this had been widely attributed to the spread between sellers' and buyers' price expectations being too far apart for deals to be concluded. It added that Sterling Shipbrokers had reported that it expected that in the Aframax sector sale volume would be "driven largely by potential sellers coming into line with buyers' price levels".

351. Also in section 4 of Kent 3, paragraph 5 described table 1. This table set out details of sales of Aframax tankers under 15 years old during the period 1 January to 5 April 2016. Paragraph 6 explained that of the ten sales listed in table 1 only three were representative of fair market value, the other seven comprising transactions which were not at arm's length.

352. Paragraphs 7 and 8 completed section 4 of Kent 3. Paragraph 7 identified the most recent arm's length transaction, which concerned a 10 year old vessel. She had been sold at a level 26% below the MSI annual average for a 10 year old Aframax in 2015, and 25% below the December 2015 MSI equivalent. Paragraph 7 added that as the vessel was constructed in China this would account for approximately 10% of the differential. The other two sales at arm's length concerned vessels which were 9 and 11 years old. Paragraph 8 of Kent 3 commented that the nature of the sales and the age of the vessels made it difficult to make any direct comparisons between the prices

in table 1 and the current level for a resale of a newly built vessel (a "0 year old resale"). Paragraph 8 then added:

> However, they do give an indication of a downward price adjustment.

353. In my view paragraph 8 of Kent 3 was designed to suggest that, although direct comparisons could not be made with a 0 year old resale, the three arm's length sales in table 1 indicated a downward price adjustment for Aframax tankers generally. In cross-examination it was suggested to him that table 1 did not tell us anything about the Aframax market on resales. He immediately replied that it did not tell us anything about the Aframax market on 0 year old resales. He then added:

> … that's why I didn't dwell on it as long.

354. Here, too, it seems to me that Dr Kent was minimizing a failure on his part to comply with his obligations to the court. Dr Kent knew that sales of vessels 9 to 11 years old shed no light whatever on the sale prices for newly built vessels. There was no useful information for present purposes in table 1. If it were to be included in Kent 3, then Dr Kent needed to make this clear. Instead of doing so, he wrongly suggested that table 1 gave a relevant indication of a downward price adjustment. In cross-examination he had no choice but to accept that table 1 was irrelevant to the questions he was asked to consider in his report. He seemed to think that he could brush the criticism aside by saying that it was because table 1 was irrelevant that he spent so little time on it. I found it deeply troubling that Dr Kent could say this, instead of recognizing that in breach of his duty to the court he had wrongly given the impression that table 1 had relevance to the questions he was asked to consider.

355. TT added that Dr Kent accepted that he could not say that evidence showed sellers dropping their price expectations for newly built resales. In cross-examination Dr Kent accepted that the passage he had cited from Sterling Shipbrokers in paragraph 4 of Kent 3 was not concerned with sales of newly built vessels. It was, he accepted, concerned with sales of vessels up to 5 years old. He had, he said, sought to convey this by referring in paragraph 4 to "modern assets". I find it difficult to see how the quotation from Sterling Shipbrokers in this regard had any relevance to the questions that Dr Kent was asked to consider, and I am perturbed that he put it at the forefront of section 4 of Kent 3 without explaining that it was irrelevant.

356. For its part, STX made a number of points about the evidence of Mr Willis. The first point made by STX in this regard was that Mr Willis had praised Dr Kent's methodology. In fact what Mr Willis said was that Dr Kent's methodology was "considerably more scientific and sophisticated than my own", and that he agreed with the merits of that methodology. The context for the first of these remarks was set out in paragraph 18 of Willis 2:

> 18. I would always maintain that any estimate of future value development is, at best, speculative and little more than educated guesswork. Economic factors and primary influences on shipping markets can change so rapidly and I have rarely seen market forecasts that proved to be particularly accurate, especially over the longer term.

357. In context, Mr Willis was saying that even with the use of "scientific and sophisticated" methodology, Dr Kent's estimates of future value were, like Mr Willis' estimates, speculative and little more than educated guesswork.

358. The context for the second of these remarks is seen in paragraph 59 of Willis 2. There, having agreed with the merits of Dr Kent's methodology, Mr Willis went on to say:

> Many of the macroeconomic indicators and much of the body of evidence that I have been able to find conflicts dramatically with several of the key components of his appraisal…

359. STX added that Mr Willis had described his own methodology as "rather rudimentary".

360. For my part, however, I have no doubt that Mr Willis is right to say that the task undertaken by the experts in the present case is necessarily speculative and not much more than educated guesswork. Mr Willis has more than thirty years experience of the sale and purchase of tankers as a broker and as a consultant. It seems to me that rudimentary methods of a person with thirty years of relevant experience may well be a better indicator of the likely future position than a "scientific and sophisticated" assessment which does not have the benefit of that level of experience.

361. In relation to the forecasting of newly built resale prices in 2016 and 2017, STX made a comment that Mr Willis's evidence was "in truth no more than a shrug and a finger in the wind." This comment is not an accurate reflection of Mr Willis's evidence. Both in his reports and in oral evidence Mr Willis gave a careful explanation of the factors that he had taken into account.

362. STX sought to support its criticisms of Mr Willis by noting that Mr Willis had "downgraded his forecasts", and had done so with "the benefit of Dr Kent's methodology". It is true that if the predicted values for 2016 and 2017 newly built resales in Willis 1 are taken together, the range identified for such vessels by Mr Willis involved a figure of $56m at the lower end of the scale to $70m at the higher end of the scale. The resale values at the high end of the scale had been arrived at by using an approach of historical trend line projection. It is true that Willis 2 reconsidered that approach in the light of what was said in Kent 1. Having done so, Willis 2 concluded that newly built resale prices during both 2016 and 2017 would fall within a range of $56m to $62m. It is also true that Willis 3, after considering what had been said in Kent 2, concluded that the relevant range during both 2016 and 2017 would be between $55m and $61m. In my view it is to Mr Willis' credit that at each stage he gave careful consideration to what was said by Dr Kent, and adjusted his own predictions in the light of his conclusions.

363. In these circumstances I consider that, if damages had fallen to be assessed by reference to newly built resale values, I should start by identifying what, on the evidence at trial, is most likely to have been the resale price which newly built vessels similar to the April option 1 and 2 vessels could reasonably be expected to have achieved if they were sold in March 2016. The reason for taking this course is twofold. First, neither Dr Kent not Mr Willis had been able to identify any newly built resales during the first quarter of 2016. Second, however, for the purposes of the trial the expert witnesses had been able to assemble assessments, usually in the form of

indices, prepared by brokers active in the market and indicating those brokers' views as to likely prices for newly built resales.

364. Thus when seeking to identify the position in March 2016 I have the benefit of assessments made by a number of active brokers in the market.

365. Mr Willis regarded the assessment of one broker only to be a reliable guide. This was Clarkson plc ("Clarksons"). Paragraph 72 of Willis 2 stated:

> As previously stated, while I do not always agree with them and believe that their data sometimes lags slightly behind real market events on particularly volatile markets, I have always found the Clarkson price-tracking indices to be the most reliable available indicator of market development and value at any given time and they always tend to be the closest match to the prevailing physical market activity. Clarksons are by far the largest ship broking firm in the world (especially since their recent merger with R.S. Platou). They have a massive research department supported by hundreds of brokers who are in daily direct contact with owners, shipyards, charterers, managers, operators and financiers. They therefore have considerably more resources at their disposal than anyone else and are certainly considered to be the most respected and authoritative provider of shipping intelligence in the world.

366. At paragraph 73 Willis 2 added:

> In my experience, taking the average of several indices published by a spread of brokers does not improve the accuracy of any valuation exercise, it instead just tends to dilute the data. For this reason I generally rely on just the Clarkson figures.

367. This aspect of the matter was developed in Willis 3 at paragraphs 13 to 16:

> 13. I have always maintained that broker indices only give a 'rough' guide to value and that physical market activity is the most important indicator of realistic market price levels. However, due to the dearth of closely comparable sales, both Dr Kent and I are, in this instance, forced to rely on broker indices more than usual. It must be remembered that all such indices are compiled by brokers (or in the case of VesselValues.com, referred to in paragraph 16 of AK3, a sometimes deeply flawed computer matrix). The brokers are ultimately making a subjective assessment reflecting hypothetical prices. On any market where there is a lack of concluded sales, brokers are not earning commissions and under such circumstances there is sometimes a natural tendency to talk down the market levels in order to encourage more sales activity.

> 14. As explained in NW2 paragraph 72, in my experience as both a broker and ship valuer, I have always found the Clarksons price-tracking indices to be much the most reliable and accurate indicator of market development. When it is considered that Clarksons have close to 1,400 employees in 46 offices based in 20 countries and that they have 139 tanker brokers, over 70 S&P brokers and 75 researchers, their information, market coverage and resources are simply staggering compared to any other shipbroking organization in the world. With so many more expert personnel talking on a daily basis to other brokers, owners, charterers, shipyards and financiers, I have considerably more faith in their data than that provided by any other broking company or source.
>
> 15. Allied Shipbrokers, by comparison, have just one office in Greece currently employing 3 tanker brokers, 17 S&P brokers and 1 researcher. Similarly Compass Maritime operate out of one office in New Jersey, employing just 9 brokers. While Affinity Shipbroking is one of the largest worldwide shipbroking organizations with offices in 6 countries, their resources are nowhere near as extensive as those enjoyed by Clarksons.
>
> 16. As Dr Kent shows in Table 2, the Clarksons index tracking the price of a 105,000 Dwt crude (non-coated) Aframax Resale has remained consistently at $55.0 million throughout 2016 to date. In my view this is the most accurate available price guide for a vessel of this type. This would indicate that a 113,000 Dwt Resale built at a yard equivalent to STX would, during 2016 to-date, have had a value in the region of $55.7 million to $56.2 million. ($55m plus $1.2m for size difference (104K to 113K), less $0.5/$1m for 2nd tier shipyard, plus $0.5m for 'products ready').

368. As explained in paragraph 16 of Willis 2, the Clarksons index for 105,000 Dwt non-coated newly built resale in March 2016 was $55m. After making adjustments identified by Mr Willis in paragraph 16 this equates to a value in the region of $55.7m to $56.2m for vessels similar to the April option 1 and April option 2 vessels.

369. In cross-examination STX sought to cast doubt on Mr Willis's use of the Clarksons index. What was suggested to him was that, in relation to the Clarksons index for Aframax shipbuilding contracts, he had been prepared to agree a figure of $53m as set out section E4.1 above, when that figure was $1m less than the figure in the relevant Clarksons index. As to that, however, Mr Willis pointed out that in that regard both he and Dr Kent had available figures for actual prices. By contrast, as set out in passages cited above, the difficulty facing both experts in relation to the present issue was that neither had been able to identify any actual newly built resales in the first quarter in 2016.

370. Dr Kent's figure in Kent 3 was $53.8m. It included an adjustment disputed by Mr Willis, namely that a 0.5% reduction in price could be secured on the footing that

orders were being placed with the same yards for multiple vessels. As to the figure which was subject to adjustment, Dr Kent said that this was based on MSI's published data. Mr Willis had expressed concern about the MSI figures as they would be taken from the MSI model with its undisclosed formulae. STX responded that MSI's published data was formulated based on actual transactions, broker published data and market intelligence. Assuming this to be true, however, I nonetheless have concerns about the reliability of Dr Kent's approach. In so far as MSI's published data is formulated based on actual transactions, neither expert has been able to identify any actual transactions for newly built resales in the first quarter of 2016. As noted earlier, Kent 3 suggested that reliance could be placed on information about second hand sales, whereas Dr Kent under cross-examination accepted that they had no relevance to newly built resale prices. Moreover, while "broker published data" was discussed in Kent 3, I have no information about what it was that constituted the "market intelligence" that gave rise to MSI's published data.

371. In these circumstances my criticism of Dr Kent in relation to what was said in Kent 3 about prices for second hand vessels has the consequence that I lack confidence that MSI's published data can be relied upon. Even without that criticism, however, the further criticisms of Dr Kent set out above have the consequence that I am unable to be confident about his evidence. By contrast I consider that Mr Willis' evidence about the Clarksons index enables me to have confidence in the approach that he has taken. In TT's closing submissions it was suggested that a figure of $55m would be an appropriate figure to adopt for newly built resale prices for vessels similar to the April option 1 and 2 vessels at the end of the first quarter of 2016. I agree. The difference between $55m and the higher range resulting from Mr Willis' adjustments will, in my view, be ample to allow for the possibility that a lower price might, for example have been obtained by way of a discount for multiple vessels.

372. I turn to the period after March 2016. Each expert identified particular factors, mainly said to have a potential impact on supply and demand, which could lead to a conclusion that newly built resale prices would rise or fall. Whether these factors are presented in Mr Willis's "rudimentary" fashion, or by adopting the "scientific and sophisticated" techniques of Dr Kent, it seems to me that none of them give me confidence that they will both be borne out by events and have the impact envisaged. Each side, as it seemed to me, placed more emphasis than could be justified on what were no more than straws in the wind. Questions were put to the experts about recent media reports, none of which provided any information of substance. The febrile nature of this discussion reached its nadir when a suggestion was made, and later withdrawn, that the conclusion I should reach might be informed by reading press reports of an international meeting which was to take place after the close of evidence.

373. STX suggested that in these circumstances TT's claim should fail because it would not have proved its case on damages. I do not agree. The position is that, for reasons given above, I have confidence that $55m can be taken as a fair approximation of newly built resale prices at the end of March 2016. In so far as either side suggests that at later dates this figure would go up or down, I am unable to find that this is more likely than not. Accordingly I consider that I can, with fairness to both sides, proceed on the basis that $55m can continue to be taken as a fair approximation of newly built resale prices during the period after the end of March 2016.

374. On this footing, if (contrary to my conclusion in section E3.1 above) damages fell to be assessed by reference to newly built resale values, the damages payable would be the difference between the purchase price of eight vessels at $55m each and the prices set out in the option agreement of $42.5m for the April option 1 vessels and $43m for the April option 2 vessels. As explained in section E6.2 below, on the footing described above the same result would apply in relation to the US$43.5m option agreement price for the April option 3 potential vessels. As I understand it the result would be that on this footing the damages payable by STX would amount to US$139.32m for all twelve vessels envisaged by the option agreement.

E5. April option 3: would it have been exercised?

375. STX submitted that there was serious doubt as to the willingness and ability of TT to purchase the April option 3 potential vessels. This suggestion was, in my view, fully answered by the evidence of Mr Bensler.

376. As to TT's willingness and ability, Mr Bensler's evidence was supported by documents concerning decisions taken by TT's board.

377. The first document was one which STX had relied upon as casting doubt on TT's willingness and ability to exercise April option 3. It was a strategy update prepared in November 2013. The update contained an introductory background section dealing with board meetings that had taken place the previous March and June. This noted that a potential "liquidity" funding gap in 2017 had been identified if market recovery did not progress as expected. STX relied upon a passage stating:

> Given [TT's] high leverage and potential for a significant funding gap, it was felt the company should only make further investments (including exercising new building options) if:
>
> - They would not exacerbate the potential 2017 funding gap.
>
> …

378. As to this:

(1) STX relied on the passage cited above as precluding additional acquisitions, pointing out that under the April option 3 potential SBCs substantial payments would need to be made at the time of the potential funding gap.

(2) This, however, ignored what was said in an earlier passage in the background section. The earlier passage made clear that priorities identified by the board in June included increasing the number of new buildings ordered "likely through exercising in-the-money options to generate liquidity…". As Mr Bensler explained, this was a reference to the options in the option agreement.

(3) The reason that the options were described as "in-the-money" was that, as both experts agree, the market at this stage was strong. TT was in a position where,

once it exercised the options, TT would have the benefit of SBCs which could be assigned or novated at a substantial premium.

(4) Thus this document clearly evidences commercial advantages to TT arising from exercise of the options, and a clear desire to gain those advantages. Exercising the options would, as Mr Bensler pointed out, enable TT to make money and increase its liquidity.

379. The second board document comprised the minutes of the June meeting. Those minutes clearly recorded agreement by the board that management would "determine the best methodology to monetize the 4+4+4 option stream received from STX. …"

380. STX also referred to an investment update issued in September 2013. Mr Bensler accepted that this document recorded that the potential funding gap in 2017 made a strategy of "no investment" a real possibility, and that it appeared that the recent ordering boom might be slowing. The answer to these points, given firmly by Mr Bensler, was that liquidity should be built by exercising the options and selling the vessels.

381. Mr Bensler agreed in cross-examination that there was a concern within TT about "inevitable over-ordering" of relevant vessels, and that a vehicle established to purchase second hand tonnage raised funds to purchase four Aframaxes. Neither of these factors, to my mind, demonstrates any flaw in the strategy described by Mr Bensler. Nor was it suggested to him in cross- examination that they did.

382. STX suggested that after a previously interested potential buyer had fulfilled its needs elsewhere TT had identified no further potential buyers of the optional vessels. This point was convincingly answered by Mr Bensler, who observed that TT's priority was to wait "until we actually knew where we were with STX".

383. In these circumstances I have no hesitation in concluding that if STX had not renounced the option agreement then TT would have had good reason to exercise, and would have exercised, April option 3 in respect of all four of the April option 3 potential vessels.

E6. April option 3: quantification issues

E6.1 April option 3: assessment in the option strike period

384. I have held in section E3.2 above that TT's damages claim in respect of April option 3 should be assessed by having regard to the price at which TT could have entered into shipbuilding contracts during the option strike period from 6 April 2014 to 5 October 2014.

385. As regards that period, the range identified by Mr Willis for SBCs similar to the April option 3 potential SBCs was $53.5m to $55m. Dr Kent identified a range from $53.4m to $54.1m. TT recognizes that the difference at the lower end of the range is so small as not to merit dispute. Accordingly, I proceed on the basis that, in order to obtain replacement SBCs, the lowest price which TT would have had to agree to pay would have been $53.4m.

386. As to the higher end of the range, TT canvassed the possibility that it "most likely would have exercised the option at the peak of the market". Drawing back from this extreme proposition, TT suggested that a fair assessment, taking into account all uncertainties, would be $54.5m per vessel. However, the uncertainties in this regard seem to me to be too great to allow such an approach. I cannot say with confidence when TT would have exercised April option 3, save that it would have done so at some point within the strike period. Accordingly I cannot be confident that the price stipulated in the replacement SBC would have been any greater than the agreed minimum of $53.4m.

387. On my calculation, after allowing for savings in supervision costs, damages of US$38,040,000 would be payable in respect of the four April option 3 vessels. Subject to the reservation identified in section E4.1 above, the total damages for all twelve vessels would be US$116,920,000.

E6.2 April option 3: assessment at dates of delivery

388. In relation to April option 3 STX says, as it did in relation to April options 1 and 2, that damages should be assessed by reference to the position at the dates when the vessels in question would have been delivered. I have set out in section E3 above my reasons for rejecting this approach. If it were to be adopted, however, then it would be necessary to identify likely newly built resale prices in 2017, and perhaps in 2018. For the reasons given in section E4.2 I conclude that $55m can continue to be taken as a fair approximation of newly built resale prices during that period.

E7. Quantum of damages: conclusion

389. If TT had succeeded on liability, subject to the reservation identified in section E4.1 above, I would have held that the damages payable by STX to TT amounted to US$116,920,000. This is because:

    (1) STX's nil loss contention fails: see section E2 above;

    (2) TT's contentions as to the relevant assessment dates are right: see section E3 above; and

    (3) On this footing:

        (a) the parties agree on the amount of damages in relation to the exercised options should be US$78,880,000: see section E4.1 above; and

        (b) I conclude that the damages in relation to the April option 3 potential SBCs amount to US$38,040,000: see section E6.1 above.

390. In the event that STX were, contrary to my view, right to say that damages should be assessed by reference to the price of newly built resales at relevant delivery dates, I conclude that, on the balance of probability, the price would have been stable at $55m: see section E4.2 above. On that footing, and subject to the reservations in sections E4.1 and E4.2 above, the damages payable by STX to TT would have been US$139,320,000: see section E4.2 above.

F. Issue estoppel and abuse of process

F1. Issue estoppel/abuse of process: introduction

391. In this section I deal with TT's estoppel/abuse of process assertions. As noted in section A3.3 above, these assertions were that STX could not advance certain arguments in the present proceedings because:

    (1) it was bound by findings in the arbitrators' reasons; or

    (2) it would be an abuse of process to rely upon such arguments when they could have been pursued in the arbitrations, but in fact either were not raised or were abandoned in the arbitrations; or

    (3) raising the arguments in these proceedings would amount to a collateral attack on the awards.

392. One of the arguments said by TT to be barred by TT's estoppel/abuse of process assertions concerns whether STX repudiated the firm SBCs. The judgments on the awards have disclosed publicly that the arbitrators found that STX had done so. In section D above I have reached the same conclusion, and accordingly it is not necessary for TT to rely upon TT's estoppel/abuse of process assertions in this regard. It is nonetheless desirable that I determine the answer to the question whether TT is entitled to rely upon TT's estoppel/abuse of process assertions. The reason is that an answer in favour of TT would, both sides agree, defeat STX's counterclaim. That counterclaim, and the position if my answer to the question identified above is not in favour of TT, are discussed in section G below.

393. There are other arguments which TT says are barred by TT's estoppel/abuse of process assertions. Identifying them, however, would reveal matters relating to the arbitrations which are confidential and, at the present stage, do not appear to be known publicly. It is not necessary to identify them for present purposes. They can properly be described as technical arguments which concern particular features of the April contracts and have no wider interest. I shall accordingly say no more about them.

394. STX notes that while the firm SBC buyers were the claimants in the arbitrations, the present claim is brought by TT, which was not a party to the arbitrations. STX accepts that if the present claim had been a claim brought by the firm SBC buyers then they would be entitled to advance their own estoppel/abuse of process assertions. But, submits STX, TT is a different legal entity from the firm SBC buyers, and cannot bring itself within any relevant legal principle which would entitle it to be put in the same position as them.

395. It is on this ground only that STX disputes TT's entitlement to rely on TT's estoppel/abuse of process assertions for the purpose of barring STX from advancing the arguments in question. If TT is, for present purposes, in the same position as the firm SBC buyers, then STX accepts that it cannot advance those arguments.

396. TT asserts that the principle of "privity of interest" puts it in the same position as the firm SBC buyers. Below I describe that principle. I then turn to examine the

arguments advanced by either side as to the application of this principle to the present facts.

F2. The principle of privity of interest

397. Megarry V-C made observations about the principle of privity of interest in a passage in his judgment in *Gleeson v J Wippell & Co* [1977] 1 WLR 510 at 515. His observations in that passage were approved by Lord Bingham of Cornhill in *Johnson v Gore Wood* [2002] 1 AC 1 at 32. The passage included the following:

> Privity for this purpose is not established merely by having "some interest in the outcome of litigation." So far as they go, I think these authorities go some way towards supporting the contention of Mr. Jacob that the doctrine of privity for these purposes is somewhat narrow, and has to be considered in relation to the fundamental principle nemo debet bis vexari pro eadem causa.
>
> I turn from the negative to the positive. In *Zeiss No. 2* [1967] 1 A.C. 853, 911, 912, Lord Reid suggested that if a plaintiff sued X and established some right in that action, a servant or third party employed by X to infringe the right and so raise the whole question again should be regarded as being a privy of X's in subsequent proceedings, for it would be X who would be "the real defendant." Lord Reid agreed with a statement which applied the rules of res judicata to subsequent proceedings brought or defended "by another on his account," that is, on X's account.
>
> This is difficult territory: but I have to do the best I can in the absence of any clear statement of principle. First, I do not think that in the phrase "privity of interest" the word "interest" can be used in the sense of mere curiosity or concern. Many matters that are litigated are of concern to many other persons than the parties to the litigation, in that the result of a case will at least suggest that the position of others in like case is as good or as bad as, or better or worse than, they believed it to be. Furthermore, it is a commonplace for litigation to require decisions to be made about the propriety or otherwise of acts done by those who are not litigants. Many a witness feels aggrieved by a decision in a case to which he is not party without it being suggested that the decision is binding upon him.
>
> Second, it seems to me that the substratum of the doctrine is that a man ought not to be allowed to litigate a second time what has already been decided between himself and the other party to the litigation. This is in the interest both of the successful party and of the public. But I cannot see that this provides any basis for a successful defendant to say that the successful defence is a bar to the plaintiff suing some third

> party, or for that third party to say that the successful defence prevents the plaintiff from suing him, unless there is a sufficient degree of identity between the successful defendant and the third party. I do not say that one must be the alter ego of the other: but it does seem to me that, having due regard to the subject matter of the dispute, there must be a sufficient degree of identification between the two to make it just to hold that the decision to which one was party should be binding in proceedings to which the other is party. It is in that sense that I would regard the phrase "privity of interest." Thus in relation to trust property I think there will normally be a sufficient privity between the trustees and their beneficiaries to make a decision that is binding on the trustees also binding on the beneficiaries, and vice versa.

398. In *Special Effects Ltd v L'Oréal SA* [2007] EWCA Civ 1, [2007] RPC 15 the Court of Appeal (Chadwick, Lloyd and Leveson LJJ) allowed an appeal against a decision of Sir Andrew Morrit C. The judgment under appeal included a passage suggesting that ordinarily each company in a group should be regarded as the privy of every other company unless it demonstrated the contrary. It was not necessary for the Court of Appeal to comment on this passage. Nonetheless they said in their judgment at paragraph 82:

> It seems to us that in [the passage in question] the Chancellor went further than was necessary for his decision. With respect, we could not agree with so general a principle. However, it seems to us that the decision may have been justified on a more limited and specific basis … If a corporate group such as L'Oreal chooses to arrange its affairs, no doubt for good reason, in such a way that matters such as trade mark oppositions, as well as applications and the holding of registered trade marks, are conducted by one company, for the benefit of others in the group, and others then use marks of which the first is the registered holder, or other marks, not yet registered, of which the first would be the holder if a registration was obtained then it seems to us that it might well be consistent with … *Gleeson v J Wippell & Co Ltd* … to regard any constraint on the first, whether by way of cause of action estoppel, issue estoppel or abuse of process, as applying also to the second as its privy.

399. The position was summarised by Floyd LJ, with whom Longmore and Moore-Bick LJJ agreed, at paragraph 32 of his judgment in *Resolution Chemicals v Lundbeck A/S* [2013] EWCA Civ 924, [2014] RPC 5:

> …a court which has the task of assessing whether there is privity of interest between a new party and a party to previous proceedings needs to examine (a) the extent to which the new party had an interest in the subject matter of the previous action; (b) the extent to which the new party can be said to be, in reality, the party to the original proceedings by reason of his relationship with that party, and (c) against this background to

ask whether it is just that the new party should be bound by the outcome of the previous litigation.

400. I was referred in argument to the judgment of Flaux J in *Standard Chartered Bank (Hong Kong) v Independent Power Tanzania Ltd* [2015] 2 Lloyd's Rep 183. I do not need to refer to the detail of that judgment: it applied the principles identified in *Gleeson* and *Resolution Chemicals* to the particular facts of the case. Flaux J's decision has since been upheld by the Court of Appeal, which took the same course: see [2016] EWCA Civ 411 at paragraph 31.

F3. Privity of interest: application to the present case

401. The mere fact that the firm SBC buyers are subsidiaries of TT does not necessarily mean that the firm SBC buyers and TT are privies. So much is common ground. However there may be circumstances where a holding company and its subsidiaries are privies. For example, this might well be the case if the holding company is a trustee for the relevant subsidiaries: see *Gleeson.* There is a spectrum, and the question I must decide is where in that spectrum the present case lies. The answer to that question depends upon an analysis of the factual position, and in particular of alleged features of that position relied upon by TT. In the paragraphs which follow I bring together points made by TT which can be regarded as forming part of particular features.

402. A first feature concerns assertions by TT that the firm SBC buyers were used as special purpose vehicles to carry out particular contracts for the benefit and under the direction of TT. TT relied upon evidence of Mr Bensler that they have no independent management: they have no boards of directors, but management is vested under the Limited Liability Company Agreements in their member, *i.e.* TT. All decisions relating to the firm SBC buyers' 'business' are recorded in TT's own board minutes. All decisions with regard to the arbitrations were made by TT and its officers, which also paid for the proceedings and gave instructions to the appointed lawyers.

403. In all material respects, however, it seems to me that this is little different from the standard arrangements under which each ship in a holding company's fleet is owned by a subsidiary one-ship company. The Limited Liability Company Agreements do no more than reflect the standard practice under which the holding company will do all the things described by Mr Bensler, albeit by going through the formalities of making arrangements for, and minuting the proceedings of, a board of directors. The only distinction is that the Limited Liability Company Agreements give TT direct legal control. That direct legal control, however, depends upon the fact that TT is the only member of the subsidiary, a fact which in the ordinary course gives any holding company the legal powers to ensure that it can, and does, completely control what is done by the subsidiary. Both the normal arrangements and those adopted for the firm SBC buyers seek to preserve the separate legal identity of the subsidiary and holding companies. They do not merge their identity. Nothing in TT's arrangements is designed to give TT an interest in the assets of the subsidiary generally or the firm SBCs in particular. Nor is anything in those arrangements designed to make TT the real party to any of the arbitrations. If either of those outcomes were to occur then the commercial advantages of the arrangement would be lost. It is an important part of those commercial advantages that the eventual shipbuilding contract is an asset of the subsidiary and not of TT, that liabilities under that contract are liabilities of the

subsidiary and not of TT, and thus that steps to enforce the contract are taken by the subsidiary, albeit that they may be financed and organized by TT.

404. A second feature identified by TT was that the LOI, providing for the conclusion of both the firm SBCs and the option agreement, was between TT and STX. Again there is nothing unusual here. I have no doubt that the parties to the LOI assumed that eventual shipbuilding contracts would be with one-ship companies created for that purpose. A preparatory agreement by the holding company carries with it neither any merging of identity between the holding company and the eventual one-ship companies nor any legal interest on the part of the holding company in the contract that is to be made between the builder and the one-ship company.

405. A third feature identified by TT was that, so long as TT remained the sole member of the subsidiary, the subsidiary was not to be regarded as a separate entity for US federal income tax purposes. This is a special arrangement as to tax which takes matters no further. Indeed, the need to provide expressly for that special arrangement confirms the important legal distinction between the two entities which otherwise applies.

406. TT also noted that I had asked Mr Bensler about a stamp that appeared on the LOI and the April agreements. It was a TT stamp. The use of that stamp as an identifying mark for documents signed by TT and its subsidiaries accords with my observations on the three features identified above.

407. These features are a country mile away from the trusteeship contemplated in *Gleeson* and the licensing arrangement in *Special Effects*. Applying the principles in *Gleeson* and *Resolution Chemicals*, the claim that TT and the firm SBC buyers are privies does not in my view reach first base. In these circumstances the question whether it is just that STX should be bound in these proceedings by the result in the arbitrations does not arise.

408. For these reasons I conclude that TT and the firm SBC buyers are not privies for present purposes. The result is that TT's estoppel/abuse of process assertions do not succeed.

G. STX's counterclaim

409. The counterclaim complained that TT had breached arbitral confidentiality by disclosing the awards and the arbitrators' reasons to the Seoul Central District Court, and by making reference to the awards and the arbitrators' reasons in the present proceedings. TT's answer was that it was not liable for breach of confidence because, as a privy of the firm SBC buyers, it had an entitlement to rely in the Korean claim and in the present claim on what would otherwise be confidential aspects of the arbitrations.

410. I have held in section G above, however, that TT had no such entitlement. In these circumstances TT initially conceded that it would not have a defence to the counterclaim. At the end of TT's closing submissions I queried whether this was so. I was troubled by the notion that the ability to disclose confidential information to the court in good faith in support of an allegation should depend on whether or not the allegation succeeded at trial.

411. In its reply submissions TT submitted that its defence to the counterclaim had pleaded that disclosure to the court was permissible in the interests of justice. In a departure from what had been submitted earlier, TT contended that its disclosure to this court and to the court in Korea had not involved a breach of its obligation of confidentiality.

412. STX in rejoinder accepted that TT was entitled to withdraw its concession. The answer, it submitted, to my concern was that if TT was not a privy, the views of the arbitrators, however distinguished those arbitrators may be, were in no different position from the views of an eminent QC. They were simply irrelevant to the point that the court had to decide.

413. This answer does not meet my concern. First, TT was not simply brandishing an opinion of the arbitrators. There was an arguable assertion, put forward in good faith, that what happened in the arbitrations could be relied upon for the purposes of TT's estoppel/abuse of process assertions.

414. Second, and importantly, there are wider considerations. In order to obtain justice a litigant may well conclude in good faith that it is necessary to disclose confidential information to the court in support of a particular argument. It would be inimical to the doing of justice if the litigant were liable for breach of confidence merely because an argument advanced in good faith had not been successful. Predictions as to whether an argument will be successful can rarely be certain. Such a rigid approach could well deter those who fear that by disclosing material to the court, no matter how carefully they go about it, they could incur a substantial liability.

415. I am not saying that the litigant can disregard the interests of those who might wish to assert that the information should remain confidential. In the present case TT gave due warning to STX, the party which could be expected to be concerned to maintain confidentiality. I have explained in section A above that the parties could have taken more efficient steps to preserve confidentiality when making disclosure to the court. However, the fault in that regard lies on both sides. Moreover, while there has been disclosure to the court here and in Korea, there is no evidence that this has resulted in any wider disclosure of confidential information that had not previously been made public.

416. In these circumstances I consider that it would be wrong to allow the counterclaim to succeed. For the reasons given above, TT is not liable for breach of confidence because the disclosure was made in the interests of justice.

Annex 1: abbreviations and short forms

In the main body of the judgment, unless the context otherwise requires, the abbreviation and short forms listed in the first column below have the meaning set out in the second column. Notes in the third column are provided for ease of reference.

Abbreviation/ short form	**Long form**	**Notes**
0 year old	See "newly built	Judgment, section E4.2

Abbreviation/ short form	Long form	Notes
resale	resale"	
Agreement	the option agreement	Judgment, section B6.3
April contracts	the firm SBCs and the option agreement together	Judgment, section A1.3
April option 1	the first of the April options	Judgment, section A1.3
April option 1 actual SBC	SBC for an April option 3 actual vessel	Judgment, section E1
April option 1 SBCs	shipbuilding contracts which were to be entered into for the April option 1 vessels	Judgment, section E1
April option 1 vessels	vessels envisaged by April option 1	Judgment, section A1.3
April option 2	the second of the April options	Judgment, section A1.3
April option 2 SBCs	shipbuilding contracts which were to be entered into for the April option 2 vessels	Judgment, section E1
April option 2 vessels	vessels envisaged by April option 2	Judgment, section A1.3
April option 3	the third of the April options	Judgment, section A1.3
April option 3 actual vessel	vessel in respect of which, for the purposes of assessment of damages, the court concludes that TT would have exercised April option 3	Judgment, section E1
April option 3 potential SBC	SBC associated with an April option 3 potential vessel	Judgment, section E1
April option 3 potential vessel	vessel in respect of which April option 3 might have been exercised if the option agreement had not been terminated	Judgment, section E1

Abbreviation/ short form	Long form	Notes
April option 3 vessels	vessels envisaged by April option 3	Judgment, section A1.3
April option vessels	vessels envisaged by the option agreement signed on 5 April 2013	Judgment, section A1.3
April options	options to order three additional sets of vessels in accordance with the option agreement signed on 5 April 2013	Judgment, section A1.3
arbitrations	arbitration proceedings begun by each firm SBC buyer against STX in 2014	Judgment, section A1.4
arbitrators' reasons	document stating the reasons for the awards	Judgment, section A1.4
article 10 enhanced refund	remedies available to the buyer under article 10(h) and (i)	Judgment, section E2.1
article 11 enhanced refund	remedies available to the buyer under the first and third paragraphs of article 11(g)	Judgment, section E2.1
assumed full performance objection	TT's additional objection to STX's nil loss contention asserting that STX's argument, as analysed by TT, was not open to STX	Judgment, section E2.1
awards	four awards issued by the arbitration tribunal on 4 December 2015	Judgment, section A1.4
B J Aviation	*B J Aviation Ltd v Pool Aviation Ltd* [2002] 2 P & CR 25	Judgment, section C3
Bensler 1	Mr Bensler's witness statement dated 29 July	Judgment, section A2

Abbreviation/ short form	Long form	Notes
	2015	
Bensler 2	Mr Bensler's witness statement dated 22 September 2015	Judgment, section A2
Bensler 3	Mr Bensler's witness statement dated 18 March 2016	Judgment, section A2
Bensler, Mr	Mr Arthur Bensler	Judgment, section A2 Director and Chairman of TT
binding option agreement intention	joint intention of the parties for the option agreement to be binding and enforceable	Judgment, section C1
CDG	Curtis Davis Garrard LLP (now Haynes and Boone CDG, LLP)	Judgment, section A3.1 Solicitors for TT
CDG's December letter	letter from CDG to STX dated 18 December 2013 in response to STX's 2 December expedited hearing e-mail	Judgment, section B6.3
CDG's February letter	Letter from CDG to MFB dated 6 February 2014 in response to the MFB's January letter	Judgment, section B7.2
Clarksons	Clarkson plc	Judgment, section E4.2 Shipbroker, whose assessment of prices for newly built resales was used by Mr Willis
confidentiality order	order made by Walker J in the present case on 14 April 2016 providing interim protection of the contentious confidential matters	Judgment, section A3.4
contentious confidential matters	matters relating to arbitration proceedings revealed in parts of the amended particulars of	Judgment, section A3.4

Abbreviation/ short form	Long form	Notes
	claim and amended reply	
Contracts	the firm SBCs	Judgment, section B6.3
Dhurandhar 1	Mr Dhurandhar's witness statement dated 30 July 2015	Judgment, section A2
Dhurandhar 2	Mr Dhurandhar's witness statement dated 23 September 2015	Judgment, section A2
Dhurandhar, Mr	Mr Niranjan Dhurandhar	Judgment, section A2 Director for Sale and Purchase and New Buildings at Teekay Corp
Didymi	*Didymi Corporation v Atlantic Lines and Navigation Inc* [1987] 2 Lloyd's Rep 166 (Hobhouse J) and [1988] 2 Lloyd's Rep 108 (Court of Appeal)	Judgment, section C3
enhanced refund sole remedy proposition	Proposition advanced by STX in the present case	Judgment, section E2.1
EOT	extension of time for provision of the refund guarantees granted to STX by Mr Dhurandhar on behalf of the firm SBC buyers	Judgment, section B4.1
firm SBC buyers	buyers under the firm SBCs	Judgment, section A1.3
firm SBC renunciatory features	four features TT relied on as showing that STX had renounced the firm SBCs	Judgment, section D2.2
firm SBCs	four shipbuilding contracts made on 5 April 2013	Judgment, section A1.3
firm vessels	four vessels to be built by STX and purchased by TT under the firm SBCs, as envisaged in the LOI	Judgment, section A1.2

Abbreviation/ short form	Long form	Notes
Gleeson	*Gleeson v J Wippell & Co* [1977] 1 WLR 510	Judgment, section F.2
Hung 1	Mr Hung's witness statement dated 28 November 2013	Judgment, section A2
Hung, Mr	Mr William Hung	Judgment, section A2 Vice President of Strategic Development Group of Teekay Corp and a member of the management team of Teekay Tanker Services
KDB	Korea Development Bank	Judgment, section A2
Kent 1	Dr Kent's expert report dated 5 November 2015	Judgment, section A2
Kent 2	Dr Kent's expert report dated 18 December 2015	Judgment, section A2
Kent 3	Dr Kent's expert report dated 5 April 2016	Judgment, section A2
Kent, Dr	Dr Adam Kent	Judgment, section A2 Director and shareholder of Maritime Strategies International Ltd
Kim, Mr	Mr Sun Moo Kim	Judgment, section A2 Vice President of Sales and Marketing for STX
lawful performance principle	principle relied on by TT that, when assessing damages, the method of performance adopted must always be one that the defendant may lawfully take within the four walls of the contract and still be performing it	Judgment, section E2.4
Lee, Mr BH	Mr Bong Hee Lee	Judgment, section A2 Deputy General Manager of Corporate Restructuring at KDB
Lee, Mr BS	Mr Bum So Lee	Judgment, section A2 Vice President and leader of Finance Team of STX
LOI	letter of intent signed by TT and STX on 15	Judgment, section A1.2

Abbreviation/ short form	Long form	Notes
	March 2013	
LOI options	options for further vessels as envisaged in the LOI	Judgment, section A1.2
Mallozzi	*Mallozzi v Carapelli S.p.A.* [1976] 1 Lloyds Reports 407	Judgment, section C3
Mamidoil	*Mamidoil-Jetoil Greek Petroleum Co SA v Okta Crude Oil Refinery AD* [2001] 2 Lloyd's Rep 76	Judgment, section C3
Marks and Spencer	*Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72; [2016] A.C. 742	Judgment, section C4.1
MFB	MFB Solicitors	Judgment, section A3.1 Solicitors for STX
MFB's January letter	letter from MFB to CDG dated 22 January 2014 in response to CDG's December letter	Judgment, section B7.1
MRI	*MRI Trading AG v Erdenet Mining Corp LLC* [2013] EWCA Civ 156; [2013] 1 Lloyd's Rep. 638	Judgment, section C3
MSI	Maritime Strategies International Limited	Judgment, section E4.2 A specialist shipping consultancy established in 1995, of which Dr Kent is a director and shareholder.
ND/SMK October telcon	telephone conversation between Mr SM Kim and Mr Dhurandhar on 18 October 2013	Judgment, section B4.8
newly built resale	sale of a newly built vessel	Judgment, section E4.2
no RG obligation proposition	STX's proposition that the provision of refund guarantees was not a contractual obligation of STX under the	Judgment, section E2.1

Abbreviation/ short form	Long form	Notes
	firm/notional SBCs	
notional SBCs	shipbuilding contracts envisaged by the option agreement	Judgment, section E2.1
option agreement	option agreement signed by TT and STX on 5 April 2013 providing for TT to have options to order three additional sets of up to four vessels	Judgment, section A1.3
optional vessels	vessels for which STX granted TT options	Judgment, section A1.2
Phillips Petroleum	*Phillips Petroleum Co (UK) Ltd v Enron (Europe) Ltd* [1997] CLC 329	Judgment, section C4.3
reasonable date alleged term	TT's alternative proposed implied term of the option agreement relating to delivery dates	Judgment, section C2
refund guarantee	letter of guarantee referred to in article 10(k) of the firm SBCs	Judgment, section A1.5
Resolution Chemicals	*Resolution Chemicals v Lundbeck A/S* [2013] EWCA Civ 924, [2014] RPC 5	Judgment, section F.2
Rix/Chadwick principles	Rix LJ's 10 principles in *Mamidoil* and Chadwick LJ's 5 principles in *B J Aviation*	Judgment, section C3
Seoul claim	claim filed by STX on 20 March 2014 at the Seoul Central District Court	Judgment, section B7.3
Song, Mr	Mr Gwan Ho Song	Judgment, section A2 General Manager, Sales and Marketing, Team No. 2 for STX
Special Effects	*Special Effects Ltd v L'Oréal SA* [2007] EWCA Civ 1, [2007]	Judgment, section F.2

Abbreviation/ short form	Long form	Notes
	RPC 15	
STX offer date alleged term	TT's original proposed implied term of the option agreement relating to delivery dates	Judgment, section C2
STX's 2 December expedited hearing e-mail	e-mail sent by Mr SM Kim to Mr Chan sent on 2 December 2013	Judgment, section B6.2
STX's best efforts obligation	STX's statement, as described in clause 4 of the option agreement, that it "will make best efforts to have a delivery date" within identified years	Judgment, section C2
STX's *Didymi* propositions	Propositions which TT said that STX derived from *Didymi*	Judgment, section C5.1
STX's freedom to negotiate contention	contention advanced by STX in the present case relating to the parties' freedom to negotiate delivery dates	Judgment, section C2
STX's nil loss contention	contention advanced by STX that the amount of TT's loss of STX's bargain as to the April option 1 SBCs and the April option 2 SBCs was nil	Judgment, section E1
STX's oral agreement assertion	assertion advanced by STX in the present case relating to oral discussions on 4 April 2015	Judgment, section A1.5
Suh, Mr	Mr Sungbeum Suh	Judgment, section A2 Manager in the STX Group Restructuring Unit, Corporate Restructuring Department at Korea Development Bank
Tolaini	*Courtney Fairbairn Ltd v Tolaini Brothers (Hotels) Ltd* [1975]	Judgment, section C3

Abbreviation/ short form	Long form	Notes
	1WLR 297	
TT project	performance by STX of the April contracts	Judgment, section D2.3
TT's estoppel/abuse of process assertions	assertions advanced by TT in the present case that STX could not advance certain arguments in the present proceedings	Judgment, section A3.3
TT's mutual intention assertion	TT's assertion in paragraph 6 of the particulars of claim that the parties intended that the option agreement be legally binding and enforceable	Judgment, section C1
TT's November claim	claim for damages put forward by TT on 16 November 2013 for failure to enter into shipbuilding contracts following the exercise of April option 1	Judgment, section B5.1
Valuation Joint Memorandum	joint memorandum dated 3 December agreed between Mr Willis and Dr Kent	Judgment, section A2
VBNP	Voluntary Business Normalisation Program	Judgment, section B3.1
what would actually happen proposition	STX's first proposition in response to TT's assumed full performance objection	Judgment, section E2.1
Willis 1	Mr Willis's expert report dated 5 November 2015	Judgment, section A2
Willis 2	Mr Willis's expert report dated 22 December 2015	Judgment, section A2
Willis 3	Mr Willis's expert report dated 10 April 2016	Judgment, section A2

Abbreviation/ short form	Long form	Notes
Willis, Mr	Mr Nicholas Willis	Judgment, section A2 Managing director of Ship Valuation Consultancy Ltd
Woodar	*Woodar Investment Development Ltd v Wimpey Construction UK Ltd* [1980] 1 WLR 277	Judgment, section D2.1

Annex 2: the ND/SMK telcon on 18 October 2013

417. Passages from the transcript of the ND/SMK October telcon are set out below. Reference numbers in square brackets have been added so as to identify the sequence in which each individual spoke. "SMK" and "ND" have been added in order to indicate whether it was Mr Dhurandhar or Mr SM Kim who was speaking. Where a part of the transcript has been omitted, this is indicated by "[…]".

> [35] ND: Are you in discussion right now with your banks or what is the situation? What is the position right now?
>
> [36] SMK: Position is nothing changed actually Niranjan actually.
>
> [37] ND: OK.
>
> [38] SMK: When is it, last April, after we signed, you know we several times applied for refund guarantee. But, you know very well about the situation,
>
> [39] ND: The banks […] .
>
> [40] SMK: … and we did not get the approval for issuance guarantee. That is our situation. No need to explain it. […]
>
> […]
>
> [42] SMK: Why are you exercising the option now? You know very well about our situation […] that it is not able to get refund guarantees under the current circumstances […]
>
> [43] ND: […] our position is very clear […] we had a contract, we are not going to go away. You know we are not going to go away is what we are saying basically. We had a contract, we expected that it would be honoured as well as the option agreement. So we are not just going to walk away from this. […]
>
> [44] SMK: But Niranjan, nobody is trying to walk away now. The problem is …
>
> [45] ND: No, no
>
> [46] SMK: … you know the builder is, even though we try continuous tried to get a refund guarantee until now …
>
> [47] ND: Right …
>
> [48] SMK: … the bank is not approval.
>
> […]

[50] SMK: […] Without refund guarantee, how do we carry on the contract?

[51] ND: Right, OK, I understand that. But then at the same time as I said, we also have the issue of damages. […] if we cannot reach a commercial situation, then we have to […] pursue the legal route […]

[…]

[53] SMK: You know, in Vancouver before the signing ceremony, we, I have explained our situation, particularly on Voluntary normalization Program. And, you raised a big concerns about our capacity and our ability to issue the guarantee. And then, at your request, we inserted the clause in the contract with the time limit, we will try to issue the guarantees but if we fail, you are going to have a cancellation of the contract and then both parties will finish the contract on a drop hands basis. I think it is more than ten […] times I told you and also your colleagues it will get drop hands basis. But know the problem is, the problem is, you are not cancelling the contract. And then how can we do it?

[…]

[55] SMK: […] In case of failure you will cancel, you said, and then in case of cancellation […] both party will finish at drop hands basis and no liability will be made. […] the problem is that you are not cancelling the contract and still you are asking us to issue the guarantee […] This is the point that I can't understand […]

[…]

[58] ND: […] we have the right to cancel the contract but we do not want to exercise that right because we would like STX to honour the contract and build the ship.

[59] SMK: Then what is the meaning in case of cancellation, we agreed, we discussed and agreed the contract will be finished at drop hands basis. But if you are still asking the shipyard and without refund guarantee, what is the point?

[60] ND: But [...] we expect that the shipyard will honour the contract

[61] SMK: We are honouring the contract, Niranjan. You don't believe me, believe us. We are continuous trying to get a refund guarantee, but we are not a bank. If bank continuously refuse then, how can we do?

[62] ND: Correct. Right. […] we are into a legal kind of area now […] So, you know, you tell us what the way out is on this […] we are in the same position for last 6 months right where we are saying that STX please honour the contract […]

[63] SMK: […] But in case of failure, then you told us that you will cancel the contract, then in case of cancellation both party already agreed to terminate the contract at drop hand basis.

[…]

[77] SMK: […] both party clearly discussed and agreed. In case of failure, then you will make a cancellation.

[…]

[79] SMK: […] We continuously updated our situation but still you are asking us issuance guarantee. For us, we really we will continuously we will make application to bank but result will be same.

[80] ND: Agree, but you know then what is the way out like you tell us. […] We will not walk away. So forget about that.

[81] SMK: Do you think we are now walk away, now? No!

[…]

[87] SMK: We continuously trying to get a refund guarantee but they have very strict guideline to issue the guarantee, yeah. You know… to issue the guarantee, we have to make a contract to comply with their guideline. But unfortunately our contract is not comply with their guideline. It is not possible to issue the guarantee now. Even though, if you want to there is no other way for us to apply the refund guarantee, but I expect that the response from the bank will be continuously the same.

[88] ND: […] I think it is very simple for them. […] either they issue the guarantee and back the contract, or you know this is going down the legal way for arbitration and damages […]

[…]

[90] ND: […] they should tell us what is their commercial position. […] We are not going away. We want damages, we want damages, we want damages.

[…]

[103] SMK: […] we wanted to, try to make the refund guarantee […] But eventually we failed. Then, as we agreed

and discussed, you have to make the cancellation of the contract.

[104] ND: We are not cancelling it is what we are saying.

[105] SMK: That's the problem now, actually. That is against what we have discussed in your office.

[106] ND: Either the contract is honoured, or we have recourse for damages right.

[107] SMK: We are honouring the contract Mr Niranjan.

[108] ND: Yes. Yes.

[109] SMK: But even though we are honouring the contract, continuously we fail to issue the guarantee. How can we do?

[110] ND: […] Commercially what do you propose is the next step? […]

[111] SMK: My question is, even though you are try not to cancel the contract what is the point in your position.

[112] ND: Well we will see …

[113] SMK: Making the contract and then without guarantee, what is the point?

[114] ND: We will see … we are not going to go away. […]

[115] SMK: Yes. Nobody is going to walk away Mr Niranjan. You are not walk away. We are not going walk away but what is the point in the long run?

[116] ND: The point, you know we have to protect our position […] we have to see what is our position in terms of securing damages.

[…]

[121] SMK: You several times asked me in case of failure you are going to have a cancellation. […]

[122] ND: […] we have a very different view on that. We have mentioned that in our email as well as in our official response.

[123] SMK: To be honest with you, (I am) sorry that it can be a very rude expression but I have to tell you. It is not what we have discussed in your office situation.

[124] ND: OK I can tell you the same […] You are going to tell me and I am going to tell you the same thing. We are not going to make any progress.

[125] SMK: Any other good idea on your position? Please ask us what we can do for you. […]

[126] ND: In what position will the bank issue the guarantee? […]

[127] SMK: Then, do you think if Teekay can change the contractual terms including price or delivery, whatever?

[…]

[135] SMK: What about the other type of ships, not Aframax Tankers?

[…]

[138] ND: Our most suitable ship type is Aframax, LR2. […] What other types of vessels do you have in your mind? MR?

[139] SMK: Yes. We are building MR. We are building different type of ship, gas carriers.

[…]

[147] SMK: Anyway, OK, we will think about it. We have to be more constructive, pragmatic and realistic. And we have to be angry with you also.

[…]

[151] SMK: […] then, before my departure I will try to give you answer.

[152] ND: […] You tell us, we will wait for your official response and we go from there.

[…]